TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 226.

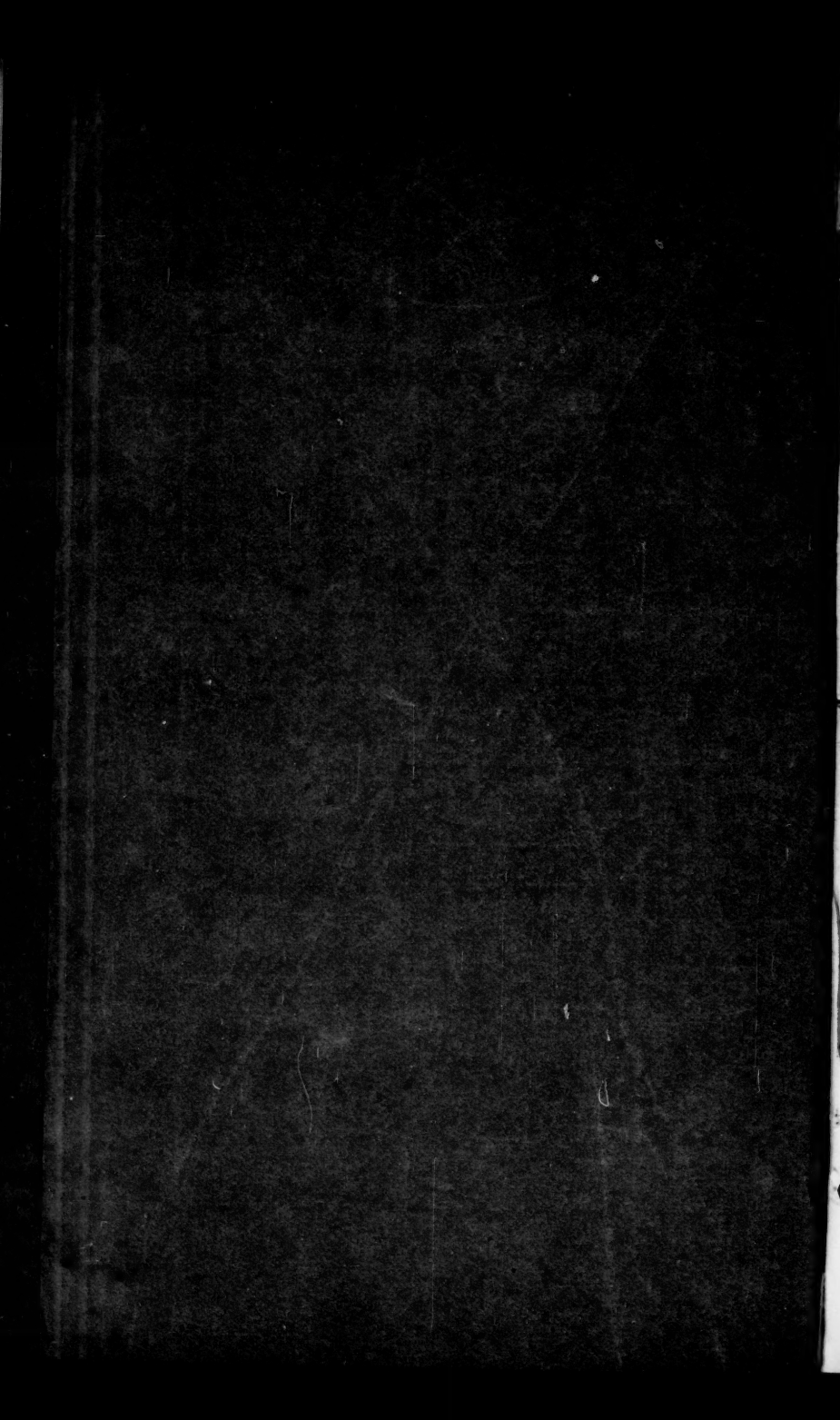
WASHINGTON FORD, PLAINTIFF IN ERROR,

vs.

JAMES SURGET.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED OCTOBER 11, 1873.



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a *Sup'eme court of Mississippi, holding sessions at Jackson.*

WASHINGTON FORD
vs.
JAMES SURGET. } No. 12108.

To the Hon. E. G. Peyton, chief justice of the supreme court of Mississippi:

The petition of Washington Ford, residing in the city of Natchez, county of Adams, and State of Mississippi, respectfully represents that the honorable the supreme court of the State of Mississippi, holding sessions at Jackson, in said State, rendered a judgment in the above-entitled suit wherein your petitioner was plaintiff in error and said James Surget was defendant in error, which suit is numbered 12,108 on the docket of said court, on the 18th day of March, A. D. 1872; that your petitioner is advised there is error to his prejudice in the said judgment; that the said supreme court is the highest court of law or equity in the said State of Mississippi in which a decision can be had in the said suit; that in said suit is drawn in question the validity of a statute of or an authority exercised under the said State of Mississippi, as stated in the decision of the said supreme court of Mississippi hereto annexed, on the ground that the exercise of the said authority is repugnant to the Constitution and laws of the United States, and the decision is in favor of the validity of such authority and against the rights of the said plaintiff in error claimed under the Constitution of the
b United States; that it appears from the record that the said supreme court of Mississippi could not have given said judgment without deciding upon the validity of the said statute of or authority exercised under the State of Mississippi, on the ground of their being repugnant to the Constitution or laws of the United States; and that accordingly a writ of error lies from said final judgment to the honorable the Supreme Court of the United States.

Your petitioner further represents that he is advised and believes he is entitled to a writ of error in the premises, on his giving bond in an amount to be fixed by your honor, with good and sufficient sureties, that petitioner, the plaintiff in error, shall prosecute his writ to effect and answer all costs and damages if he fail to make his plea good. Wherefore petitioner prays that a writ of error may be allowed to him, and that a citation be signed, to be served on the said James Surget according to law, and returnable to the Supreme Court of the United States upon petitioner's giving bond as the law direct.

WASHINGTON FORD,
By NUGENT & YAGER, *Att'es.*

Petition and writ of error allowed by me this 25th day of August, A. D. 1873.

E. G. PEYTON,
Chief Justice of the Supreme Court of the State of Mississippi.

(Indorsed:) 12,108. Supreme court of M'ss'i. Washington Ford vs. James Surget. Petition for writ of error. Filed Aug. 25, 1873. J. M. McKee, cl'k. N. & Y.

REC. 226—1

c UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the State of Mississippi, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Washington Ford, plaintiff, and James Surget, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the
d decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff, Washington Ford, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Nathan Clifford, senior judge of the Supreme Court, the 25th day of August, in the year of our Lord one thousand eight hundred and seventy-three.

Issued September 4th, 1873.

GEO. T. SWANN,
Clerk of the Circuit Court of the United States for the Southern District of Mississippi.

Allowed by

E. G. PEYTON,
Chief Justice of the Supreme Court of the State of Mississippi.

$1.00 clerk's fee for writ, paid by appellant.
Sept. 4, 1873.
[SEAL.] GEO. T. SWANN, *Clk.*

(Indorsed:) Filed Sept. 4, 1873. J. M. McKee, cl'k.

e The United States of America to James Surget, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Mississippi, wherein Washington Ford is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said

plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable E. G. Peyton, chief justice of the supreme court of the State of Mississippi, this 25th day of August, in the year of our Lord one thousand eight hundred and seventy-three.

E. G. PEYTON,
Chief Justice M.

f On this 13th day of September, in the year of our Lord one thousand eight hundred and seventy-three, personally appeared Sam'l R. Porter before me, the subscriber, a United States commissioner for the southern district of Mississippi, and makes oath that he delivered a true copy of the within citation to James Surget, on the 13th day of September, A. D. 1873.

S. R. PORTER.

Sworn to and subscribed the 13th day of September, A. D. 1873.
[SEAL.] FRED. PARSONS,
U. S. Commissioner.

(Indorsed:) Filed Sept. 16th, 1873. J. M. McKee, cl'k.

g Know all men by these presents, that we, Washington Ford, R. E. McClure, and George Schwartz, all of the city of Natchez, county of Adams, Mississippi, are held and firmly bound unto James Surget in the full and just sum of two hundred and fifty dollars, to be paid to the said James Surget, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this eighth day of July, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas lately at a term of the supreme court of Mississippi, in a suit depending in said court, between Washington Ford, plaintiff, and James Surget, defendant, a judgment was rendered against the said Ford, plaintiff, as aforesaid, and the said Washington Ford having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James Surget, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Washington Ford shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WASHINGTON FORD. [L. S.]
R. E. McCLURE. [L. S.]
GEORGE SCHWARTZ. [L. S.]

Sealed and delivered in presence of—

Approved by—
E. G. PEYTON,
Chief Justice Supreme Court of Mississippi.

THE STATE OF MISSISSIPPI,
Adams County, ss:

Personally appeared before me, Allison H. Foster, chancery clerk of the chancery court of said county, the foregoing named R. E. McClure

and George Schwartz, who, after being duly sworn, deposed and said that they were each worth in their own right, in visible property in the State of Mississippi, double the amount of the penalty of the within bond, over and above their liabilities and legal obligations, and from my own knowledge I know this to be true.

Witness my hand and seal of said court, at the city of Natchez, this July 8th, 1873.

[SEAL.] ALLISON H. FOSTER, *Clerk.*

(Indorsed:) Supreme Court. Washington Ford vs. James Surget. Bond. Filed Sept. 16, '73. McKee, cl'k.

1 THE STATE OF MISSISSIPPI:

Pleas and proceedings had at a regular term of the supreme court, begun and held in the court-room in the capitol at the city of Jackson, in said State, on the third Monday of October, in the year of our Lord one thousand eight hundred and seventy-one.

Present, the Hon. E. G. Peyton, chief justice, and the honorable H. F. Simrall, and the honorable J. Tarbell, associate judges; also, James M. McKee, clerk of said court; the sheriff of Hinds County, and his deputy, W. M. Massey, being in attendance upon said court, as provided by law.

Whereupon proclamation having been duly made, the court proceeded to the dispatch of business.

2 [Be it remembered that heretofore, to wit, on the 30th day June, A. D. 1869, the following transcript was filed in this court, as follows, to wit:]

WASHINGTON FORD
vs.
JAMES SURGET.

Pleas before the Hon. James M. Smiley, presiding judge of the first judicial district of the State of Mississippi, at a term of the circuit court of Adams County, State aforesaid, begun and held at the court-house in and for said county, on the second Monday of October, in the year of our Lord one thousand eight hundred and sixty-six.

Be it remembered that heretofore, to wit, on the 2nd day of October, A. D. 1866, came the said plaintiff by attorneys, and filed in the office of the clerk of said circuit court his certain complaint, as follows, to wit:

THE STATE OF MISSISSIPPI, *Adams County:*

In circuit court thereof, October term, A. D. 1866.

3 To the hon'ble James M. Smiley, judge of said court:

Washington Ford, of said county, plaintiff, complains of James Surget, of said county, defendant, for that the said plaintiff, at his plantation in said county, on the fifth day of May, in the year 1862, was possessed, as of his own personal property, of two hundred bales of cotton, averaging in weight four hundred pounds per bale, and of the value of six hundred dollars per bale; and being so possessed, the said defendant, at the place aforesaid, and upon the day and year aforesaid, did wilfully and utterly, and against the consent and will of said plaintiff, destroy by fire the said two hundred bales of cotton, to the

great damage of said plaintiff, to wit, to his damage in the sum of one hundred and twenty thousand dollars; wherefore, the said plaintiff prays a judgment against said defendant in said sum of one hundred and twenty thousand dollars, and all costs, &c.

THACHER & GNICE AND MEDDERHOFF,
Attorneys for Plaintiff.

4 On the same day of filing said complaint the following summons was issued, to wit:

STATE OF MISSISSIPPI, *Adams County:*

The State of Mississippi to the sheriff of Adams County, greeting:

You are hereby commanded, without delay, to summon James Surget, to be and appear before the judges of the State aforesaid, at a circuit court to be holden at the court-house in and for the county of Adams, on the second Monday in October, 1866, to answer to Washington Ford, complainant, and have then and there this writ.

Witness my hand, official seal, at Natchez, this 2nd day of October, A. D. 1866.

[L. S.] S. WOOD, *Clerk.*

[50 cts., internal-revenue stamp, cancelled.]

Upon which summons is the following endorsements:

Received October 2nd, 1866.

BEN. F. B. HUNTER, *Sh'ff.*

5 Executed the within original process by leaving a true copy thereof at the place of residence of said defendant, James Surget, in the county of Adams, by taking said true copy to the front door of a cabin of his said place of residence, being the most public place at said residence, he being not found, and no free white person being there willing to receive the same.

B. F. B. HUNTER, *Sh'ff,*
By H. ELLIS.

OCTOBER 3d, 1866.

I, Ben. F. B. Hunter, sheriff of Adams County and State of Mississippi, do hereby nominate and appoint Henry Ellis my special deputy sheriff to execute the within summons.

BEN. F. B. HUNTER, *Sheriff.*

OCTOBER 2d, 1866.

Afterwards, to wit, on the 23d day of October, A. D. 1866, came the said defendant, by attorney, and filed his certain answer to said complaint herein, as follows, to wit:

STATE OF MISSISSIPPI, *Adams County:*

Circuit court, October term, 1866.

6 WASHINGTON FORD *vs.* JAMES SURGET. } App's. 163.

1. And said defendant, by attorney, comes and defends the force and injury, when, &c., and for plea says actio non, because he says he is not guilty of the said trespass in injury in said declaration set forth; and of this he puts himself upon the country.

2d. And said defendant, for a further plea in this behalf, by attorney, says actio non, because he says that at the time of the said alleged burning and destruction of said cotton the people of said State of Mississippi were at war with the Northern States of the United States of America, and the people of the States of Louisiana, Alabama, Georgia, Florida, Arkansas, South Carolina, North Carolina, Virginia, Texas, and Mississippi had combined and confederated together to wage a war against the then Government of the United States of America, and formed a separate government, known as and called the Confed-
7 erate States of America, and that the said Confederate States, at the time of the alleged burning of said cotton, to wit, on the said 5th day of May, A. D. 1862, so organized as a separate government as aforesaid, by force and arms had full possession and control over the country and inhabitants of said State Mississippi, and maintained and kept on foot in said State a military force and army, of which Gen. G. T. Beauregard was commander; and that at the time of said alleged burning of said cotton, to wit, on the 5th day of May, A. D. 1862, Alexander K. Farrar, of said county, was acting as provost-marshal of said county of Adams, and as an officer under the said government of said Confederate States, and was subject to the orders and control of the said Gen. Beauregard, and that the said Farrar, in the said exercise of his said office, and by virtue of a certain order to him given by the said Gen. Beauregard, in words and figures as follows, to wit:

"To A. K. FARRAR, *Provost-Marshal:*

8 "In conjunction with the governor of Mississippi, you will forthwith burn all cotton likely to fall into the hands of the enemy along the river and railroad.

(Signed) "G. T. BEAUREGARD."

Issued and delivered to said defendant the following order, to wit:

"PROVOST-MARSHAL OFFICE,
"*Natchez, May 2d*, 1862.

"To the citizens of Adams County:

"The following message has been received from General Beauregard:

"'To A. K. FARRAR, *Provost-Marshal:*

"'In conjunction with the governor of Mississippi, you will forthwith burn all cotton likely to fall into the hands of the enemy along the river and railroad.

(Signed) "'G. T. BEAUREGARD.'

"You are hereby directed to execute the above order by burning, or otherwise destroying, all cotton likely to fall into the hands of the enemy on the banks of the Mississippi River in the county of Adams, but so as not to endanger the destruction of buildings or other property.

9 "James Surget & John Minor, you will proceed at once to execute the above order on the following plantations, viz: John Minor, Carthage; Washington Fords; est. of B. Wade; G. G. Gregery.

(Signed in duplicate) "A. K. FARRAR,
"*Provost-Marshal.*"

Which order is herewith filed, and marked A. That said order so given was received by said defendant before the said alleged burning of

said cotton of the said plaintiff, and that the river mentioned in said order was the Mississippi River, and that the said Washington Ford, mentioned in said order, was the plaintiff, and that said plaintiff's plantation is and was upon the bank of the said Mississippi River, and the said cotton alleged to have been burnt was near the river-bank, and likely to fall into the hands of the enemy, to wit, the forces of the said United States, then at war with the said Confederate States of America, and the people of said State of Mississippi, and that the said defendant, in pursuance of and by virtue of said order so issued by said Farrar, as provost-marshal as aforesaid, burned the said cotton of said plaintiff, in obedience to the order of said government of said Confederate States, through the said Gen. Beauregard and said provost-marshal, the said Confederate States then having a government and armies, and having full power, control, and jurisdiction as a bel'igerent government by force of arms in the State of Mississippi, and over the property and the territory thereof, and all its inhabitants, and this the said defendant is ready to verify; whereof he prays judgment, &c.

3d. And said defendant, for a further plea in this behalf, says, by attorney, actio non, because he says that the said burning and destruction of said cotton belonging to the said plaintiff was done by him in obedience to the orders of the government of the Confederate States of America, a belligerent and separate government at the time of said burning, then having and exercising full and unlimited control, authority, and jurisdiction by force of arms and in time of war, over the territory, property, and inhabitants of said State of Mississippi, and then at war with the Government of the United States, and this the said defendant is ready to verify; wherefore he prays judgment, &c.

(Signed) MARTIN,
Att'r. for Def't.

(The following is the order above referred, and made a part of the above answer, to wit:)

"PROVOST MARSHAL'S OFFICE,
"*Natchez, May* 2, 1862.

"To the citizens of Adams County:

"The following message has been received from General Beauregard:

"'To A. K. FARRAR, *Provost-Marshal:*

"'In conjunction with the governor of Mississippi, you will forthwith burn all cotton likely to fall into the hands of the enemy along the river and railroad.

(Signed) "'G. T. BEAUREGARD.'

"You are hereby directed to execute the above order, by burning or otherwise destroying all cotton likely to fall into the hands of the enemy on the banks of the Mississippi River, in the county of Adams, but so as not to endanger the destruction of buildings or other property.

"James Surget and John Minor, you will proceed at once to execute the above order on the following plantations, to wit: John Minor, Carthage; Washington Fords; est. of B. Wade; G. G. Gregory.

(Signed) "A. K. FARRAR.
(Signed in duplicate.) "*Provost Marshal.*"

STATE OF MISSISSIPPI, *County of Adams:*

Circuit court, October term, 1866.

Personally appeared before the undersigned, clerk of said court,
13 the above-named defendant, James Surget, and made oath that the matters and things in the pleas by him above secondly and thirdly pleaded are true.

(Signed) JAMES SURGET.

Sworn to and subscribed before me this 23d day of October, A. D. 1866.

S. WOOD, *Cl'k.*

And now at this day, to wit, on the 26th day of October, A. D. 1866, being the seventeenth day of the October term, A. D. 1866, of said court, the following proceedings were had herein, to wit:

WASHINGTON FORD
vs. } 163.
JAMES SURGET.

And the said defendant Surget, having had leave of this court to plead, answer, or demur to said plaintiff's declaration during this October term of said court, and having plead this 23rd day of Octo-
14 ber, 1866, to said action, leave is hereby given to said plaintiff, in this cause, to demur or reply to said defendant's pleas in said cause within 60 days from this date without prej'ice to the trial of said cause at the next term of this court.

Afterwards, to wit, on the 18th day of December, A. D. 1866, came the said plaintiff, by attorneys, and filed his demurrer to second plea as follows, to wit:

STATE OF MISSISSIPPI, *Adams County:*

In circuit court thereof. To April term A. D. 1867.

WASHINGTON FORD
vs. }
JAMES SURGET.

And the said plaintiff, by his attorneys, and by leave of the court, &c., saith the said plea of said defendant, secondly above pleaded in this action, and the matter therein contained, in manner and form,
15 as the same are above pleaded and set forth, are not sufficient in law as an answer to said complaint or declaration, and that he, the said plaintiff, is not bound by law to answer same, and this he is ready to verify, and wherefore, for want of a sufficient plea in this behalf, plaintiff prays judgment, &c.

THACHER & GUICE,
J. A. T. MEDDERHOFF,
Attorneys for Pl'ff.

And said plaintiff, according to the form of the statute in such cases made and provided, states and shows to the court here the following causes of demurrer to second plea, that is to say:

1st. That the said matters said plea contained are not by law issuable in this action.

2nd. That the said defendant hath not, in and by his said plea, denied, confessed, or avoided the substantial matters of plaintiff's complaint.

3d. That the matters in said plea contained attempt to create issues hostile to the supremacy of the United States, to the constitu-
16 tion and laws of the State of Mississippi, and subversion of peace and good order, and contrary to public policy.

4th. That the defense sought to be raised in said plea are not maintained or sustained by the laws of nations nor the laws of war.

5. That the said plea contains neither a technical, special, nor general traverse of the allegation of plaintiff's complaint.

6th. And, also, that the said plea is argumentative, and in other respects and particulars uncertain, informal, and insufficient, &c.

THACHER & GUICE,
J. A. S. MEDDERHOFF,
Att'ys for P'lff.

And, also, on the same day, to wit, the 18th day of December, A. D. 1866, came the said plaintiff, by his attorneys, and filed his demurrer to third plea, as follows, to wit:

THE STATE OF MISSISSIPPI, *Adams County:*

In circuit court thereof, to April term, A. D. 1867.

17 WASHINGTON FORD }
vs.
JAMES SURGET. }

And the said plaintiff, by his attorneys and by leave of the court, &c., saith the said plea of said defendant thirdly above pleaded in this action and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law as an answer to said complaint or declaration, and that he, the said plaintiff, is not bound by law to answer same, and this he is ready to verify, &c. Wherefore, for want of a sufficient plea in this behalf, plaintiff prays judgment, &c.

And said plaintiff, according to the form of the statutes in such cases made and provided, states and shows to the court here the following causes of demurrer to said plea, that is to say:

1st. That the said matters in said plea contained are not by law issuable in this action.

18 That the said defendant hath not, in and by his said plea, denied, confessed, or avoided the substantial matters of plaintiff's complaint.

3rd. That the matters in said plea contained attempt to create issues hostile to the supremacy of the United States, to the constitution and laws of the State of Mississippi, and subversive of peace and good order, and contrary to public policy.

4. That the defences sought to be made in said plea are not warranted or sustained by the laws of nations nor the laws of war.

5. That the said plea containes neither a technical, special, nor general traverse of the allegations of plaintiff's comp'aint.

6th. And also that the said plea is argumentative and in other respects uncertain, informal, and insufficient, &c.

THACHER & GUICE,
J. A. T. MEDDERHOFF,
Att'y for Pl'ff.

Afterwards, to wit: on the 8th day of April, A. D. 1867, being
19 the first day of the April term, A, D. 1867, of said court, the following proceedings were had, to wit:

WASHINGTON FORD } 200.
vs.
JAMES SURGET. }

Motion for leave to file second count in this cause sustained.

On the same day, to wit: on the 8th day of April, A. D. 1867, came the said plaintiff, by attorneys, and filed in the clerk's office of said circuit court his second count, as follows, to wit:

THE STATE OF MISSISSIPPI, *Adams County, ss:*

Circuit court thereof, to April term, 1867.

WASHINGTON FORD } 200.
vs.
JAMES SURGET. }

Said plaintiff, by leave of the court here just had and obtained, files the following additional count to his original declaration, herein; And further, that said plaintiff, at his plantation in said county, on the
20 fifth day of May, in the year of eighteen hundred and sixty-two, was possessed, of his own personal property, of certain other two hundred bales of cotton, in the lint, of an average weight of four hundred pounds per bale, and of the value of six hundred dollars per bale; and being so possessed, the said defendant, at the place and time aforesaid, did wilfully, wantonly, and maliciously, against the consent and contrary to protestations of said plaintiff, wholly and utterly destroy by fire the said two hundred bales of cotton, whereby, being deprived thereof, and of the sale of the same, said plaintiff was and has been damaged in the sum of one hundred and twenty thousand dollars: wherefore he prays judgment therefor, and all costs, &c., &c.

THATCHER & GUICE,
Att'ys for Pl'ff.

Afterward, to wit: on the 26th day of April, A. D. 1867, being the 17th day of the April term, A, D. 1867, of said circuit court, the following proceedings were had therein, as aforesaid, to wit:

21 WASHINGTON FORD } 200. On demurrer.
vs.
JAMES SURGET. }

Demurrer overruled; leave granted to file additional pleas, and cause continued.

Afterwards, to wit, on the 6th day of August, A. D. 1867, came the said defendant, by his attorney, and filed in office of the clerk of the said circuit court his 1st, 2nd, and 3rd pleas to second count, as follows, to wit:

THE STATE OF MISSISSIPPI, *Adams County:*

In the circuit court of said county.

WASHINGTON FORD
vs.
JAMES SURGET.

And as to the said additional and second count to the said declaration by him, the said plaintiff, above pleaded, the said defendant, by his attorney, comes and defends the force and injury, when, &c., and
22 for plea says that he is not guilty of the trespass and injury therein laid to his charge and set forth; and of this he puts himself upon the country.

And for a further plea to the said second count of the said declaration, the said defendant, by his attorneys, saith actio non, because he says that at the time of the said alleged trespass in said second count mentioned, the people of the said State of Mississippi were at war with the Northern States of the United States of America, and the people of the States of Louisiana, Alabama, Georgia, Arkansas, Florida, North Carolina, Virginia, Texas, and Mississippi had combined and confederated together to wage a war against the then Government of the United States of America, and formed a separate government, known as, and called, the Confederate States of America; and that the said Confederate States, at the time of the said supposed trespass, to wit, on the said 5th day of May, A. D. 1862, so organized as a separate govern-
23 ment as aforesaid, by force and arms had full possession and control over the country and inhabitants of said State of Mississippi, and maintained and kept on foot in said State a military force and army, of which Gen'l G. T. Beauregard was commander; and that at the time of said alleged trespass, to wit, on the 5th day of May, 1862, Alexander K. Farrar, of said county, was acting as provost-marshal of said county of Adams, and as an officer under the said government of the Confederate States, and was subject to the orders and control of the said Gen'l Beauregard, and that the said Farrar, in the execution of his said office, and by virtue of a certain order to him given by the said Gen'l Beauregard, in words and figures as follows, to wit:

"To A. K. FARRAR, *Provost-Marshal:*

"In conjunction with the governor of Mississippi, you will forthwith burn all cotton likely to fall into the hands of the enemy, along the river and railroad.

(Signed) "G. T. BEAUREGARD."

Issued and delivered to said defendant the following order, to wit:

24 "PROVOST-MARSHAL OFFICE,
"*Natchez, May 2d*, 1862.

"To the citizens of Adams County:

"The following message has been received from Gen'l Beauregard:

"'To A. K. FARRAR,
"'*Provost-Marshal.*

"'In conjunction with the governor of Mississippi, you will forthwith burn all cotton likely to fall into the hands of the enemy along the river and railroad.

(Signed) "'G. T. BEAUREGARD.'

"You are hereby directed to execute the above order, by burning or otherwise destroying all cotton likely to fall into the hands of the enemy on the banks of the Mississippi River in the county of Adams, but so as not to endanger the destruction of buildings or other property. James Surget & John Minor; you will proceed at once to execute the above orders on the following plantations, say, John Minor, Carthage, Wash ington Fords, Est. of B. Wade, G. G. Gregory."

(Signed in duplicate.) "A. K. FARRAR,
"*Provost-Marshal.*"

25 And which said order is filed with and annexed to the said plea by this defendant, secondly above pleaded to the said original declaration, and marked "A." That the said order so given was received by the said defendant, before the alleged burning of the said cotton of the said plaintiff; and that the "river" mentioned in said order was the Mississippi River, and that the said Washington Ford, mentioned in said order, was the, and that said plaintiff's plantation is and was upon the banks of said Mississippi River, and the said cotton alleged to have been burned was near the river-bank, and likely to fall into the hands of the enemy, to wit, the forces of the said United States, then at war with the said Confederate States of America, and the people of said State of Mississippi; and that said defendant, in pursuance of and by virtue of said order so issued by said Farrar, provost-marshal as aforesaid, burned the said cotton of said plaintiff in obedience to the order of said
26 government of said Confederate States, through the said Gen'l Beauregard, and said provost-marshal; the said Confederate States then having a government and armies, and having full power, control, and jurisdiction as a belligerent government by force of arms in the said State of Mississippi, and over the property and the territory thereof, and all its inhabitants; and this the said defendant is ready to verify; wherefore he prays judgment, &c.

And for a further plea to the said second count of said declaration by him, the said plaintiff abovepleaded, the said defendant, by his attorneys, saith actio non, because he says that the said burning and destruction of said cotton belonging to the said plaintiff was done by him in obedience to the orders of the government of the Confederate States of America, a belligerent and separate government at the time of
27 said burning, then having and exercising full and unlimited control, authority, and jurisdiction by force of arms, and in time of war, over the territory, property, and inhabitants of said State of Mississippi, and then at war with the Government of the United States, and this the said defendant is ready to verify; wherefore he prays judgment, &c.

W. T. MARTIN,
WINCHESTER & NORTH,
Attorneys for Defendant.

On the same day, to wit, on the 6th day of August, A. D. 1867, came the said defendant, by his attorneys, and filed in the clerk's office of said circuit court his certain 4th and 5th pleas, as follows, to wit:

THE STATE OF MISSISSIPPI, *Adams County:*

In the circuit court of said county.

WASHINGTON FORD
vs. } 61.
JAMES SURGET.

And the said defendant, for a further plea to the said declaration, as well to the first as to the second and additional count thereof, by
28 leave of the court here first had and obtained, by his attorneys, saith, that the said plaintiff ought not to have or maintain his aforesaid action against him, because he saith that before and at the time at which the said several supposed trespasses are in said declaration alleged to have been committed, the people of the said State of Mississippi, and of the States of Texas, Arkansas, Louisiana, Alabama, Georgia, Florida, South Carolina, North Carolina, and Virginia had been and were confederated together and in revolt against the Government of the United States of America, and had, within their territory, subverted the said Government, and erected therein, for the government thereof and its inhabitants, a new and separate government called the Confederate States of America; and that, at the time at which the said several supposed trespasses are in said declaration alleged to have been committed, a war had been, and was then,
29 waged and prosecuted by and between the said United States and the said Confederate States of America, and against each other as belligerant nations; and that the said Confederate States, for the maintenance therein of its said government, and the prosecutions of said war, then had and maintained in the said State of Mississippi an army, of which General Gustavus T. Beauregard was the commander; and that the territory, property, and inhabitants of said State were thereby held in subjection and under the control and jurisdiction of the said Confederate States government; and that before that time, to wit, on the second day of May, A. D. 1862, the said General Gustavus T. Beauregard had made and issued a general order directed to officers under his command to burn all cotton along the Mississippi River that was likely to fall into the hands of the enemy, to wit, the forces of the said United States of America; that before and at the time last aforesaid, Alexander K. Farrar was acting as provost-marshal of said
30 county of Adams for the execution therein, among other duties, of the orders of the military commanders in the service of the said Confederate States, in said State of Mississippi; and that in pursuance of and in obedience to said general orders, he was then commanded to burn forthwith all cotton along the bank of said river likely to fall into the hands of the enemy, to wit, the land or naval forces of the said United States; that the said cotton of plaintiff in said declaration mentioned, was then near the bank of said river, and within the said county of Adams, and was then and thereafter, until the time when the said supposed trespasses in said declaration mentioned were committed, likely to fall into the hands of the enemy, to wit, the naval forces of the said United States of America; and that the said defendant was then ordered by the said Farrar, then acting as aforesaid as provost-marshal of said county, to burn the said cotton of said plaintiff; and that afterwards, to wit, at the time aforesaid of the commission of the said several supposed trespasses in said declaration men-
31 tioned, he, the said defendant, by force of, and in obedience to

the said orders of the said military commander and the said provost-marshal, did burn the said cotton of the said plaintiff in said declaration mentioned, which are the same supposed trespasses whereof the said plaintiff hath above thereof complained against this defendant; and this he, the said defendant, is ready to verify; wherefore he prays judgment, &c.

And for a further plea to the said action, the said defendant, by leave of the court first had and obtained, saith actio non, because he saith that at and before the time when the said several trespasses in said declaration mentioned and therein alleged to have been committed, the people of the said State of Mississippi, and of the States of Virginia, North Carolina, South Carolina, Florida, Georgia, Alabama, Louisiana, Arkansas, and Texas had confederated together for revolt against, and within their territorial limits had subverted, the Government of the United
32 States of America, and had in the place thereof and within and for their territory and people erected a new and separate government, called the Confederate States of America, composed and constituted by executive, legislature, and judicial departments; and that, on the sixth day of March, 1862, and from that date until the time when the said several supposed trespasses in said declaration mentioned are therein alleged to have been committed, a war had been and was then waged and prosecuted by and between the said United States and the said Confederate States of America, and against each other as belligerent nations; and that the said Confederate States, for the prosecution of said war, and the maintenance therein of its powers, then and before had and kept on foot an army in the said State of Mississippi, of which General Gustavus T. Beauregard was the commander, and as such in the service of the said Confederate States; and that thereby the territory, property, and inhabitants of said State were held
33 in subjection to and under the control and jurisdiction of the said Confederate States; and that, on the sixth day of March, A. D. 1862, and by act approved and promulgated on that day the legislative power of the said Confederate States of America, to wit, the congress of the Confederate States of America, had enacted that it should be the duty of all military commanders in the service of the said Confederate States to destroy all cotton, tobacco, or other property that might be useful to the enemy, to wit, the forces of the said United States of America, whenever in their judgment the same should be about to fall into their hands; that afterwards, to wit, on the second day of May, A. D. 1862, the said General Gustavus T. Beauregard, in pursuance of and obedience to said act, had made and issued a general order, directed to officers under his command and in the service of the said Confederate States, in said State of Mississippi, to burn all cotton along the Mississippi River likely to fall into the hands of the forces of the United States of America; that, before and at the date
34 last aforesaid, and afterwards until the time when the said several supposed trespasses in said declaration mentioned were committed, Alexander K. Farrar was acting as provost-marshal of said county of Adams, for the execution therein, among other duties, of the orders of the military commanders in said State, in the service of the said Confederate States, and in pursuance and for the execution of said general order within the said county of Adams, was commanded to burn all cotton along the bank of said river likely to fall into the hands of the forces of the said United States; that the said cotton in said declaration mentioned was then near the bank of said river and within said county, and likely to fall into the hands of the naval forces of the said United

States, and that the said defendant was then ordered by the said Farrar, then acting as aforesaid as provost-marshal of said county of Adams, to burn the said cotton of plaintiff; and that afterwards, to wit,
35 at the time when the said several supposed trespasses in said declaration mentioned were committed, he, the said defendant, in obedience to and in pursuance of said act of said congress of the Confederate States, and the said orders of the said military commander and provost-marshal, in the service thereof, did burn the said cotton of the said plaintiff in said declaration mentioned; which are the same supposed trespasses whereof the said plaintiff hath above thereof complained against this defendant; and this he, the said defendant, is ready to verify; wherefore he prays judgment, &c.

WILL. T. MARTIN,
WINCHESTER & NORTH,
Atty's for Def't.

(To the above is entered the following, to wit:)

And as to the plea of said defendant by him next above pleaded, being numbered 4th & 5th, to the whole of plaintiff's declaration, said plaintiff, by his attorneys, comes and says, that the same, and the
36 matters thereof, in manner and form, &c., are not sufficient in law to bar or preclude him, said plaintiff, from having or maintaining his aforesaid action thereof against him, said defendant; and that he, said plaintiff, is not bound by the law of the land to answer the same, and this he is ready to verify; wherefore he prays judgment, &c.; and according to the statute said plaintiff shews the following special causes of demur to said 4th & 5th pleas:

1st. Said pleas do not, nor does either of them, shew any sufficient legal answer or bar to plaintiff's causes of action.

2nd. Said pleas admit the trespasses complained, yet shew no sufficient matter in avoidance thereof.

3rd. Said pleas present matters not issuable or trialable in this action.

4th. Said pleas do not, nor does either of them, contain any denial of the allegations in 2d count of plaintiff's declaration, that the defendant destroyed the property, and committed the trespass in question "wilfully, wantonly, and maliciously."

37 5th. Said defendant, in his said pleas, seeks to rely, for justification of the trespasses committed by him, upon matters in themselves wholly illegal, against peace and good policy, and contrary to the Constitution of the United States, the supreme law of the land, and the Government thereof.

6th. Said defendant in and by his said pleas does not shew that he acted otherwise than voluntarily and gratuitously, not being in the military or naval service of said Confederate States.

And because said pleas are in other respects uncertain, informal, and insufficient.

THACHER & GUICE,
Sol's for Pl'ff.

And on the same day, to wit, on the 6th day of August, A. D. 1867, came the said defendant by his attorneys and filed in the clerk's office of the said circuit court his 6th plea, as follows, to wit:

STATE OF MISSISSIPPI, *Adams County:*

In the circuit court of said county.

38 WASHINGTON FORD *vs.* JAMES SURGET. } 61.

And for a further plea to said action, the said defendant, by leave of the court first had and obtained by his attorneys, saith actio non, because he saith that at the time when the said several trespasses in said declaration mentioned are therein alleged to have been continued, the people of the said State of Mississippi, and of the States of Virginia, North Carolina, South Carolina, Florida, Georgia, Alabama, Louisiana, Arkansas, and Texas, had confederated together for a revolt against and a subversion within their territorial limits of the Government of the United States of America, and had then within their territory subverted the said Government, and in the place thereof had erected a separate and independant government, called the Confederate States of America, having and exercising all the functions of a civil government within said territory, and over its inhabitants; that a war
39 was then waged and prosecuted by and between the said United States and the said Confederate States of America, and against each other, and the armies of each, as belligerent nations; and that the said war was, on the part of the United States, waged and prosecuted against and for the invasion and conquest of the territory, armies, and people of the said Confederate States, and, on the part of the said Confederate States, for the defence of their territory, property, and inhabitants against such invasion and conquest; and that the said United States, with their naval forces, were then invading, for a conquest of its people and the capture of its property, the territory of the State of Mississippi; and that the said cotton of the said plaintiff in said declaration mentioned was about to fall by capture into the hands of the said naval forces; that the said defendant was then an inhabitant and citizen of the said State of Mississipi, and subject to the power and jurisdiction, and living under the protection of the government of the said Confederate States; and that, to prevent a capture of the said cotton
40 by the said naval forces of the said United States, he then burned and destroyed the same; which are the same supposed trespasses whereof the said plaintiff hath above thereof complained against the defendant; and this he, the said defendant, is ready to verify; wherefore he prays judgment, if he, the said plaintiff, shall, &c., &c.

WILL. T. MARTIN,
WINCHESTER & NORTH,
Attorneys for Def't.

Herewith attached is the following, to wit:

And said plaintiff, as to the plea of said defendant by him next above pleaded, says that the same and the matters therein, in manner and form, &c., are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against him, said defendant, and that he, said plaintiff, is not bound by the law of the land to answer the same; and this he is ready to verify.
41 Wherefore he prays judgment, &c., and, for special causes of demur to said plea according to the statute, said plaintiff shews—

1st. Said plea professes to be in bar of the whole declaration, which contains two counts, when it is no legal answer to either.

2d. Said plea shews no reason, in law, for the commission by defendant of the trespasses complained of.

3d. Said plea contains no denial of the allegation in the 2d count of the plaintiff's declaration set forth that defendant "wilfully, wantonly, and maliciously" committed the acts complained of.

4th. Said plea admits that the action of the State of Mississippi, Virginia, and others named and alleged to have constituted the Confederate States was a revolt and a rebellion against the Government of the United States, and hence no act by said defendant, of his own volition thereunder, could be valid or legal, or he, by reason thereof, claim exemption or protection from the consequences of his conduct. And because said plea is in other respects uncertain, informal, and insufficient.

THACHER & GUICE,
Sol's for Pl'ff.

42 On the same day, to wit, on the 6th day of August, A. D. 1867, came the said defendant, by his attorneys, and filed in the clerk's office of the said circuit court his seventh plea, as follows, to wit:

THE STATE OF MISSISSIPPI, *Adams County:*

In the circuit court of said county.

WASHINGTON FORD
vs.
JAMES SURGET.

And the said defendant, for a further plea to the said action, by leave of the court first had and obtained by his attorneys, saith actio non, because he says that at the time when the said several trespasses in said declaration mentioned are therein alleged to have been committed, the people of the said State of Mississippi, and of the States of Virginia, North Carolina, South Carolina, Florida, Georgia, Alabama, Louisiana, Arkansas, and Texas had confederated together for a revolt against and a subversion, within their territorial
43 limits, of the Government of the United States of America, and had then within their territory subverted the said Government, and in the place thereof had ordained and erected a separate and independant government called the Confederate States of America, having and exercising all the functions of a civil government within said territory, and over its property and inhabitants; that before and at the time a war had been waged and prosecuted by and between the persons exercising the powers of Government of the said United States, and those exercising the same powers of the said Confederate States, and against each other, and the armies of each as belligerent powers and nations; and that before that time and while the said war was flagrant, the persons exercising the legislative power of the government of the said Confederate States had ordained and enacted that thereafter it should be the duty of all the military commanders in the service of
44 the said Confederate States to destroy all cotton whenever the same should be about to fall into the hands of the enemy, to wit, the forces of the said United States; that at and before the time when the said several supposed trespasses are in said declaration alleged to have been committed, to wit, on the second day of May, 1862, and there-

after until the date of said supposed trespasses, the said Confederate States had on foot and maintained in said State of Mississippi an army whereby the said Confederate States exercised full power, control, and jurisdiction over the territory, property, and inhabitants thereof; that General Gustavus T. Beauregard was, during the same time, the commander of said army, and as such in the service of the said Confederate States; that, during the same time, Alexander K. Farrar was provost-marshal of the said county of Adams, and as such likewise in said service for the execution of such laws, orders, and duties as were devolved upon said office by said Confederate States and said
45 military commander and his subordinates; and that the said defendant was then an inhabitant and citizen of the said State of Mississippi, subject to the power, authority, and jurisdiction, and living in the allegiance and under the protection of the said Confederate States; that, on the said second day of May, A. D. 1862, the said Gustavus T. Beauregard ordered all cotton along the Mississippi River in said State of Mississippi, which was likely to fall into the hands of the forces of the said United States, to be burned; that the said cotton of said plaintiff in said declaration mentioned was then near the bank of the said river, within the said county of Adams, and about to fall into the power and hands of the naval forces of the said United States, and that the said Farrar, then as aforesaid provost-marshal of said county, and in the service of the said Confederate States for the execution of the laws and orders of the said Confederate States and its military commander, then ordered and required the said defendant to burn
46 the said last-mentioned cotton; and that this defendant did thereupon, and on the day and year in said declaration mentioned as the date of the said several supposed trespasses, under and in obedience to said laws and orders, burn and destroy the said cotton, which are the same several supposed trespasses in the said declaration mentioned, and whereof the said plaintiff hath above complained against this defendant; and this he, the said defendant, is ready to verify; wherefore he prays judgment, &c., &c.

W. T. MARTIN,
WINCHESTER & NORTH,
Att'ys for Def't.

(Herewith is attached *is* the following, to wit:)

And as to the plea of said defendant by him next above pleaded, said plaintiff, by his attorneys, comes and says, that the same and the matters therein, in manner and form, &c., are not sufficient in law to bar or preclude him, said plaintiff, from having or maintaining his aforesaid action thereof against him, said defendant, and that he, said
47 plaintiff, is not bound by the law of the land to answer the same, and this he is ready to verify; wherefore, &c., he prays judgment, &c., and for special causes of demurrer to said plea, said plaintiff according to the statute shews:

1st. Said plea shews no legal or sufficien t bar to plaintiff's cause of action.

2d. The matters whereon said defendant relies to justify the trespasses alleged against him, were and are wholly illegal, contrary to the Constitution of the United States and the Government thereof, and can constitute no protection to the defendant, claiming to have acted thereunder.

3d. Said plea does not contain matters issuable and trialable in this

action, nor, admitting the trespasses complained of, does it confess and avoid the same by good and sufficient reasons in law.

4th. Said plea professes to be in bar to the whole of said plaintiff's declaration, which contains two counts, when it is a sufficient answer to neither.

48 5th. Said plea contains no denial of the allegations in the 2d count of plaintiff's declaration, that defendant "willfully, wantonly, and maliciously" committed the act complained of.

And because said plea is in other respects uncertain, informal, and insufficient.

THACHER & GUICE,
Sol's for Plaintiff.

Afterwards, to wit, on the 16th day of October, A. D. 1867, came the said plaintiff by attornies, and filed his similiter and replications, as follows, to wit:

THE STATE OF MISSISSIPPI, *Adams County, ss:*

Circuit court thereof, to October term, 1867.

WASHINGTON FORD
vs.
JAMES SURGET.

And as to the said plea of said defendant, by him firstly above pleaded, (filed October 23rd, 1866,) and whereof he hath put himself upon

49 the country, said plaintiff doth the like.

And as to the said plea of said defendant by him secondly above pleaded, (filed October 23d, 1866,) said plaintiff says precludi non, because, denying all and singular allegations in and of said plea, he says that the said defendant, at the place and time in said 1st count of said declaration mentioned, of his own using and without the cause by him in his said second plea alleged, committed the said trespass in manner and form as said plaintiff has in his said first count of said declaration complained against said defendant, and 'his said plaintiff prays may be required of by the country, &c.

And as to the said plea of said defendant by him thirdly above pleaded, (filed October 23rd, 1866,) said plaintiff says precludi non, because he says, denying all and singular the allegations of said plea, in manner and form, &c., that said defendant at the time and place in said

50 1st count of said declaration mentioned, of his own wrong and without the cause by him in his said third plea pretended, committed the said trespass, in manner and form as said plaintiff has in the 1st count of his said declaration complained against said defendant, and this said plaintiff prays may be enquired of by the country, &c.

THACHER & GUICE,
Sol's for Pl'ff.

On the same day, to wit, on the 16th day of October, A. D. 1867, came the said plaintiff, by attorneys, and filed in the clerk's office of the circuit court, a "similiter and demurrer to plea to 2d count" as follows, to wit:

THE STATE OF MISSISSIPPI, *Adams County, ss:*

Circuit court thereof, to October term, 1867.

WASHINGTON FORD
vs.
JAMES SURGET.

And as to the 1st plea of said defendant to the 2d count of plain-
51 tiff's declaration, whereof said defendant hath put himself upon the country, said plaintiff doth the like.

And as to the 2d and 3d pleas of said defendant, by him pleaded to the 2d count of plaintiff's declaration, said plaintiff, by his attorneys, comes and says that the same and the matters therein are not sufficient in law, in manner and form, &c., to bar or preclude him, said defendant, from having or maintaining his aforesaid action thereof against him, said defendant, and that he, said plaintiff, is not bound by the law of the land to answer the same; and this he is ready to verify. Wherefore, &c., he prays judgment, &c., and for special causes of demurrer to said pleas, said plaintiff, according to the form of the statute, shows: 1st. Said pleas profess, each of them, to be in bar to the 2d count of plaintiff's declaration, when neither of them contain any legal or sufficient answer thereto. 2d. Said pleas, and neither of them, show
52 or disclose any legal justification, by defendant, of the tresspass complained of in said 2d count. 3rd. Said pleas do not, nor does either of them, contain any denial of the allegation in said 2d count, that said defendant destroyed the property in question "wilfully, wantonly, and maliciously." 4th. Said pleas, and each of them, contain matters not issuable or tri*al*able in this action, and while confirming the trespass set forth in said 2nd count, do not sufficiently or legally avoid the same. 5th. The matters of said pleas, whereon said defendant seeks to rely, in justification of his trespass, are and were wholly illegal, contrary to good policy, against the Constitution and government of the United States, and can furnish no protection to defendant in the premises. 6th. Said pleas, and neither of them, show that Farrar was legal provost-marshal, or could act as such, or that he acted in conjunction with the governor of Mississippi in burning said cotton, or that defendant was in the military or naval service of the Con-
53 federate States, or in any way bound to obey the pretended order under which he claims to have acted, but that he acted wholly voluntarily and gratuitously.

And because said pleas, and each of them, are in other respects uncertain, informal, and insufficient.

THACHER & GUICE,
Sol's for Pl'ff.

January special term, A. D. 1868, of said circuit court, this cause was continued.

And now, at this day, to wit, on the 17th day of April, 1868, being the fifth day of the April term, A. D. 1868, of said circuit court, proceedings were had herein as follows, to wit:

WASHINGTON FORD
vs.
JAMES SURGET.

Leave granted to amend demurrer as to second and third pleas.

And now at this day, to wit, on the 29th day of April, 1868, being the

15th day of the April term, A. D. 1868, of said circuit court, pro-
54 ceedings were had herein as follows, to wit:

WASHINGTON FORD
vs.
JAMES SURGET.

Demurrer overruled, and leave given to answer.

On the same day, to wit, on the 29th day of April, A. D. 1868, came the said plaintiff, by attorneys, and filed herein his replication to 2d, 3d, 6th, and 7th pleas, as follows, to wit:

Replication to 2d and 3d pleas to 2d count.

THE STATE OF MISSISSIPPI, *Adams County:*

In the circuit court, to April term, 1868.

WASHINGTON FORD
vs.
JAMES SURGET.

And the plaintiff replying *replying* to the second plea (filed August 6th, 1867) to the 2d count in this behalf by the defendant pleaded, says precludi non, because, denying all and singular the allegations by the defendant in said 2d plea made, he says that said defendant, at the
55 time and place in said second count of plaintiff's declaration mentioned, of his own wrong, wilfully, wantonly, and maliciously, and without the cause by him in his said plea alleged, committed the said trespass in manner and form as plaintiff in his said second count of said declaration hath complained against him, said defendant; and this said plaintiff prays may be inquired of by the country.

And the plaintiff, replying to the 3d plea (filed August 6th, 1867) to the 2d count in this behalf by the defendant pleaded, says precludi non, because, denying all and singular the allegations by the defendant in said 3d plea made, he says that the defendant at the time and place in said 2d count of plaintiff's declaration mentioned, of his own wrongs, wilfully, wantonly, and maliciously, and without the cause by him in his said plea alleged, committed the said trespass in manner and form as plaintiff in his said 2d count of his said declaration hath com-
56 plained against him, said defendant; and this the plaintiff prays may be inquired of by the county.

And the plaintiff, replying to the 6th plea (filed August 6th, 1867) to the second count of plaintiff's declaration by the defendant in this behalf pleaded, says precludi non, because, denying all and singular the allegations by the defendant in his said 6th plea made, he says that the defendant, at the time and place in said second count of said declaration mentioned, of his own wrong, wilfully, wantonly, and maliciously, and without the cause by him in his said plea alleged, committed the trespass in manner and form as plaintiff in his said second count of his said declaration hath complained against him, said defendant; and this the plaintiff prays may be inquired of by the country.

And the plaintiff, replying to the 7th plea (filed August 6th, 1867) to the second count of plaintiff's declaration by the defendant in
57 this behalf pleaded, says precludi non, because, denying all and

singular the allegations by the defendant in his said 7th plea made, he says that the defendant at the place and time in said 2d count of said declaration mentioned, of his own wrongs, wilfully, wantonly, and maliciously, and without the cause by him in his said 7th plea alleged, committed the trespass in manner and form as plaintiff in his said declaration hath complained against him, said defendant; and this the plaintiff prays may be inquired of by the country.

(Signed) CASSIDI,
STOCKDALE,
GUICE,
MELLEN,
Pl'ff's Attorneys.

On the same day, to wit, on the 29th day of April, A. D. 1868, came the said plaintiff, by attorneys, and filed herein his "replication to 4th and 5th pleas to 2d count," as follows, to wit:

58 Circuit court of Adams County, April term, A. D. 1868.

WASHINGTON FORD
vs.
JAMES SURGET.

And as to the said plea of said defendant fourthly above pleaded, (filed August 6th, 1867,) said plaintiff says precludi non, because, denying all and singular the allegations in and of said plea, he says that the said defendant at the place and time in said 2d count of said declaration mentioned, of his own wrong and wilfully, wantonly and maliciously, and without the cause by him in his said fourth plea alleged, committed the said trespass in manner and form as said plaintiff has in his said second count of his said declaration complained against said defendant; and this said plaintiff prays may be inquired of by the country.

And as to the said plea of said defendant fifthly above pleaded, (filed August 6th, 1867,) said plaintiff says precludi non, because, denying all and singular the allegations in and of said plea, he says
59 that the said defendant at the place and time in said 2d count of said declaration mentioned, of his own wrong, wilfully, wantonly, and maliciously, and without the cause by him in his said fifth plea alleged, committed the said trespass in manner and form as said plaintiff has in his said 2d count of his said declaration alleged; and this the said plaintiff prays may be inquired of by the country.

GUICE, MELLEN, CASSIDY & STOCKDALE,
Plaintiff's Att'ys.

The deposition of A. P. Kirby, a witness herein, was filed in the clerk's office of said court on the 10th day of April, A. D. 1867, and is as follows, to wit:

Interrogatories to be propounded to A. B. Kirby, residing in the parish of Concordia, and State of Louisiana, the answers whereunto
60 will be offered in evidence in the action at law now pending in the circuit court of Adams County, in the State of Mississippi, wherein Washington Ford is plaintiff and James Surget is defendant for and in behalf of said plaintiff.

1st. Are you acquainted with the parties to this suit?

2d. State your age and occupation.

3d. Were you present at the burning of certain cotton belonging to the plaintiff and on his plantation in Adams County, Mississippi, on the Mississippi River, about ten miles below the city of Natchez, by the defendant, or by his orders, in the month of May, A. D. 1862?

4th. Did you, either before or after the burning of said cotton, and, if so, when, have any conversation with, or hear the said James Surget, the defendant, say anything respecting the burning of said cotton, or respecting the said plaintiff, Washington Ford, in connection with said cotton? and if so, state fully what was said by said James Surget.

61 5th. If you know anything further on this subject, of benefit to said plaintiff, please state the same fully as if specially interrogated thereunto.

THACHER & GUICE & DAVIS,
Att'ys for Pl'ff.

Cross-interrogatories.

1st. State how, when, and for what purpose and by what authority said Surget stated he burned said cotton, if you state he burned it at all.

MARTIN, *Att'y for Def't.*

Legal exceptions waived, further notice and affidavit and commission waived, and agreed that the testimony may be taken before any justice of the peace of Adams County, Miss., or Concordia Parish, Louisiana, who will certify to his official capacity.

MARTIN,
Att'y for Def't.

Deposition of A. B. Kirby, taken and subscribed before me, Charles F. Merrick, a justice of the peace for the county of Adams, State of Mississippi, on the 10th day of April, A. D. 1867, between the

62 hours of 3 p. m. and 4 p. m. of said day, at my office in the city of Natchez, county and State aforesaid, by virtue of the agreement hereto returned annexed, and to be read as evidence in a certain cause now depending in the circuit court of Adams County, State of Mississippi, wherein Washington Ford is plaintiff, and James Surget is defendant, on behalf of the plaintiff.

A. B. KIRBY, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in regard to the matters in controversy in the suit aforesaid, did then and there, on his oath aforesaid, depose as follows, to the written interrogatories and cross-interrogatories propounded, hereto returned annexed.

Answers to 1st int'y. I am.

Answers to 2d int'y. Between thirty-five and forty years old; and by occupation a planter.

Answers to 3d int'y. I was not present.

63 Answers to 4th int'y. At that time I was in the employ of J. Surget, and he wrote me to remove the cotton on his place, out of reach of being burned; which I did. I then received orders from Surget or John Minor—do not recollect which—to assist Mr. Minor, with all the hands and teams, in removing his (M.'s) from Carthage; we removed most of it, and by order of Mr. Minor burned about forty bales in the seed. We had orders to remove the cotton within a certain space of time to a sufficient distance back from the river. In common conversa-

singular the allegations by the defendant in his said 7th plea made, he says that the defendant at the place and time in said 2d count of said declaration mentioned, of his own wrongs, wilfully, wantonly, and maliciously, and without the cause by him in his said 7th plea alleged, committed the trespass in manner and form as plaintiff in his said declaration hath complained against him, said defendant; and this the plaintiff prays may be inquired of by the country.

(Signed) CASSIDI,
STOCKDALE,
GUICE,
MELLEN,
Pl'ff's Attorneys.

On the same day, to wit, on the 29th day of April, A. D. 1868, came the said plaintiff, by attorneys, and filed herein his "replication to 4th and 5th pleas to 2d count," as follows, to wit:

58 Circuit court of Adams County, April term, A. D. 1868.

WASHINGTON FORD
vs.
JAMES SURGET.

And as to the said plea of said defendant fourthly above pleaded, (filed August 6th, 1867,) said plaintiff says precludi non, because, denying all and singular the allegations in and of said plea, he says that the said defendant at the place and time in said 2d count of said declaration mentioned, of his own wrong and wilfully, wantonly and maliciously, and without the cause by him in his said fourth plea alleged, committed the said trespass in manner and form as said plaintiff has in his said second count of his said declaration complained against said defendant; and this said plaintiff prays may be inquired of by the country.

And as to the said plea of said defendant fifthly above pleaded, (filed August 6th, 1867,) said plaintiff says precludi non, because, denying all and singular the allegations in and of said plea, he says
59 that the said defendant at the place and time in said 2d count of said declaration mentioned, of his own wrong, wilfully, wantonly, and maliciously, and without the cause by him in his said fifth plea alleged, committed the said trespass in manner and form as said plaintiff has in his said 2d count of his said declaration alleged; and this the said plaintiff prays may be inquired of by the country.

GUICE, MELLEN, CASSIDY & STOCKDALE,
Plaintiff's Att'ys.

The deposition of A. P. Kirby, a witness herein, was filed in the clerk's office of said court on the 10th day of April, A. D. 1867, and is as follows, to wit:

Interrogatories to be propounded to A. B. Kirby, residing in the parish of Concordia, and State of Louisiana, the answers whereunto
60 will be offered in evidence in the action at law now pending in the circuit court of Adams County, in the State of Mississippi, wherein Washington Ford is plaintiff and James Surget is defendant for and in behalf of said plaintiff.

1st. Are you acquainted with the parties to this suit?

2d. State your age and occupation.

3d. Were you present at the burning of certain cotton belonging to the plaintiff and on his plantation in Adams County, Mississippi, on the Mississippi River, about ten miles below the city of Natchez, by the defendant, or by his orders, in the month of May, A. D. 1862?

4th. Did you, either before or after the burning of said cotton, and, if so, when, have any conversation with, or hear the said James Surget, the defendant, say anything respecting the burning of said cotton, or respecting the said plaintiff, Washington Ford, in connection with said cotton? and if so, state fully what was said by said James Surget.

61 5th. If you know anything further on this subject, of benefit to said plaintiff, please state the same fully as if specially interrogated thereunto.

THACHER & GUICE & DAVIS,
Att'ys for Pl'ff.

Cross-interrogatories.

1st. State how, when, and for what purpose and by what authority said Surget stated he burned said cotton, if you state he burned it at all.

MARTIN, *Att'y for Def't.*

Legal exceptions waived, further notice and affidavit and commission waived, and agreed that the testimony may be taken before any justice of the peace of Adams County, Miss., or Concordia Parish, Louisiana, who will certify to his official capacity.

MARTIN,
Att'y for Def't.

Deposition of A. B. Kirby, taken and subscribed before me, Charles F. Merrick, a justice of the peace for the county of Adams, State of Mississippi, on the 10th day of April, A. D. 1867, between the

62 hours of 3 p. m. and 4 p. m. of said day, at my office in the city of Natchez, county and State aforesaid, by virtue of the agreement hereto returned annexed, and to be read as evidence in a certain cause now depending in the circuit court of Adams County, State of Mississippi, wherein Washington Ford is plaintiff, and James Surget is defendant, on behalf of the plaintiff.

A. B. KIRBY, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in regard to the matters in controversy in the suit aforesaid, did then and there, on his oath aforesaid, depose as follows, to the written interrogatories and cross-interrogatories propounded, hereto returned annexed.

Answers to 1st int'y. I am.

Answers to 2d int'y. Between thirty-five and forty years old; and by occupation a planter.

Answers to 3d int'y. I was not present.

63 Answers to 4th int'y. At that time I was in the employ of J. Surget, and he wrote me to remove the cotton on his place, out of reach of being burned; which I did. I then received orders from Surget or John Minor—do not recollect which—to assist Mr. Minor, with all the hands and teams, in removing his (M.'s) from Carthage; we removed most of it, and by order of Mr. Minor burned about forty bales in the seed. We had orders to remove the cotton within a certain space of time to a sufficient distance back from the river. In common conversa-

tion, Surget remarked to me that he had burned Washington Ford's cotton, also Mr. Gregory's; that G. was a gentleman, but that Mr. Ford endeavored to screen his and prevent its being burnt.

Answer to 5th int'y. I know of nothing else than what I have stated.

Cross-interrogatory:

Answer to 1st cross-int'y. It was some time in May, 1862; do not know how it was burned. I only knew from what Mr. Surget
64 told me, and he said he had orders to burn the cotton, from A. K. Farrar, acting as provost marshal for Adams County.

(Signed) A. B. KIRBY.

STATE OF MISSISSIPPI, *Adams County:*

I, Charles F. Merrick, a justice of the peace in and for said county and State, do hereby certify and make known, that the foregoing deposition of A. B. Kirby was taken before me at the time and place mentioned in the caption hereof above mentioned; that the answers were reduced to writing by me in my own proper handwriting, in presence of deponent, and that all the erasures and interlineations were made by me before signature of deponent; that the same was sworn to and subscribed in my presence, and carefully read over to deponent before signature; and I further certify that I am duly commissioned as a justice of the peace in and for said county and State.

Witness my hand and seal, April 10th, 1867.

C. F. MERRICK, *J. P.* [SEAL.]

65 The depositions of Gen. G. T. Beauregard and Dr. S. Choppin, to be used in evidence herein, were filed in the circuit clerk's office on the 22d day of April, A. D. 1867, and *is* as follows, to wit:

Commission for depositions.

STATE OF MISSISSIPPI, *County of Adams:*

The State of Mississippi to P. Charles Cuvellier, or any other commissioner of the State of Mississippi in the State of Louisiana, greeting:

Know ye, that we, trusting to your fidelity and provident circumspection, do give you full power to call and cause to come before you, at such time and place as you may appoint, Gen. G. T. Beauregard and Dr. S. Choppin, citizens and resident of New Orleans, and witnesses on the part of the defendant, in a certain cause now pending and undetermined in our circuit court of Adams County, State of Mississippi, wherein Washington Ford is plaintiff and James Surget is de-
66 fendant, and them diligently examine, on oath, duly administered, (which oath you are hereby authorized to administer,) touching the matter in controversy, according to the interrogatories hereto attached, and which said examination you will please put down in writing, plainly and distinctly, and the same send to our said court, with all convenient speed, under your hand and seal certified, enclosing also this commission.

Witness Henry J. Wilkins, clerk of the circuit court of the said county, and the seal thereof, at his office in the city of Natchez, in said county, this 27th day of March, A. D. 1867.

[SEAL.] H. J. WILKINS, *Clerk.*

STATE OF MISSISSIPPI, *County of Adams:*

Circuit court, April term, 1867.

WASHINGTON FORD
vs.
JAMES SURGET.

Interrogatories to be propounded to G. T. Beauregard and Dr. Samuel Choppin, citizens and residents of the city of New Orleans and State of Louisiana, witnesses for defendant in the above-entitled cause:

1. Are you acquainted with the parties to this suit?
2. Look upon an order hereto appended, and marked A A, purporting to be signed by G. T. Beauregard, and state what you may know touching such order. By whom, when, and where was the order issued? Was it published, and how? If you have the original in your possession, please state whether the copy filed herewith is a true copy of said order.
3. During the months of May, June, and July, of the year 1862, did you hold any office in the army of the Confederate States? If so, what was the office; over what troops, and over what district of country did your authority extend? Was the State of Mississippi or its territory and inhabitants, at any time during the year 1862 under your jurisdiction or authority as an officer of the Confederate States? If so, state how long you had and exercised such authority.
4. What river was referred to in said order?
5. What was the extent and character of the authority you exercised in said State of Mississippi? When did you begin to exercise such authority, and when did you cease to exercise it?
6. Had you any authority from any government, "de jure" or "de facto," during the time you exercised such authority, to destroy private property to prevent its falling into the hands of the enemies of the government you served?
7. This is a suit brought against defendant for damages for burning cotton under said order. Please state all that you may know to the advantage of defendant.

(Signed) MARTIN,
For Defendant.

Commissions may issue on the interrogatories and cross-interrogatories, without further notice, to P. Charles Cavellier or any other commissioner of the State of Mississippi in Louisiana.

(Signed) THACHER & GUICE,
Pl'ff's Att'ys.

MARCH 26, 187–.

STATE OF MISSISSIPPI, *Adams County:*

Circuit court, April term, 1867.

WASHINGTON FORD
vs.
JAMES SURGET.

Cross-interrogatories to be propounded to G. T. Beauregard and Dr.

S. Choppin, *a* citizen' and resident' of the city of New Orleans, in the State of Louisiana, witnesses for defendant in the above-entitled cause.

1. If, in your answer to the 6th interrogatory-in-chief you reply that you held any such authority as therein described from a government "de jure" or "de facto," state if that authority was confided to you by any other government than that of the so-called confederate
70 government, and state from which government you did obtain said authority.

2. State if under the authority of the so-called confederate government, or any other derived from it, a civilian could properly be appointed and constituted to the office of provost-marshal.

3. If you know of anything that may be of benefit to the plaintiff in this action, please to state it as if specially interrogated thereto.

(Signed) THACHER & GUICE,
For Pl'ff.

This is Exhibit B referred to in the annexed deposition of G. T. Beauregard.

(Signed) P. CHARLES CUVELLIER,
Commissioner.

NEW ORLEANS, *March* 29, 1867.

Respectfully referred to Gen. Thos. Jordan, for his information and remarks. I do not recollect if Natchez and vicinity were then in my dep't.

Yours, &c.,

G. T. BEAUREGARD.

MEMPHIS, *April 3rd*, 1867.

71 Natchez was not strictly within the limits of Gen'l Beauregard's command, but I recollect that, upon the report of Gen. Dahlgreen, of a state of affairs in that vicinity, it was regarded as necessary to exercise supervision to a certain extent as intimately connected with defense of Vicksburg. It is my recollection, also, that all orders were given to or through Gen'l Dahlgreen, and that they embraced instructions in regard to cotton liable to fall into the hands of the Federal troops. It should be remembered that these orders in regard to the destructions of cotton were founded upon the provisions of an act of the confederate congress, March 6th, 1862:

"That it shall be the duty of all military commanders in the service of the confederate States to destroy all cotton, tobacco, or other property that may be useful to the enemy, if the same cannot be safely removed, whenever, in their judgment, the said cotton, tobacco, or other property is about to fall into the hands of the enemy."

72 But even had there been no special warrant, such as this act of congress, Gen'l Beauregard and every commanding officer would have been authorized to issue such orders and enforce them, from the fact that the Federals treated cotton differently from other private property in hands of non-combatant citizens of the country, and seized and appropriated the same as spoils of war. And it was, therefore, the duty of all, even local, military commanders, as a war-measure, to destroy cotton about to fall into the hands of and to be of immediate value to the enemy in the conduct of the war.

(Signed) THOMAS JORDAN,
Ex-Chief of Staff, Army of Miss.

This is exhibit "A A," referred to in the annexed deposition of G. T. Beauregard and S. Choppin.

(Signed) P. CHARLES CUVELLIER,
Commissioner.

EXHIBIT A A.

"PROVOST-MARSHAL'S OFFICE,
"*Natchez, May 2d*, 1862.

"To the citizens of Adams County:

73 "The following message has been received from Gen'l Beauregard:

"'To A. K. FARRAR, *Provost-Marshal:*

"'In conjunction with the governor of Mississippi, you will forthwith burn all cotton likely to fall into the hands of the enemy along the river and railroad.

(Signed) "'G. T. BEAUREGARD.'

"You are hereby directed to execute the above order, by burning or otherwise destroying all cotton likely to fall into the hands of the enemy on the banks of the Mississippi River in the county of Adams, but so as not to endanger the destruction of buildings or other property."

Be it remembered that, on the seventeenth day of April, in the year *of* one thousand eight hundred and sixty-seven, by virtue and in pursuance of a commission to me directed from the honorable the circuit court of Adams County, in the State of Mississippi, to take the depositions of Gen'l G. T. Beauregard and Dr. S. Choppin, citizens and

74 residents of New Orleans, and witnesses on the part of the defendant in a certain cause now pending and undetermined in the court aforesaid, wherein Washington Ford is plaintiff and James Surget is defendant.

I, Piere Charles Cuvellier, a commissioner of the State of Mississippi, duly appointed and commissioned, resident in New Orleans, in the State of Louisiana, did cause to come before me at my office in the said city of New Orleans, Gen. Gustavus T. Beauregard, a person of sound mind and above twenty-one years of age, who, being by me duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matter in controversy in the suit aforesaid, in answer to the interrogatories and cross-interrogatories annexed to the commission aforesaid, did depose and say as follows:

In answer to the first interrogatory, he says: I am not.

In answer to the second interrogatory, he says: I have looked at the paper referredto in this interrogatory. I have no recollection of

75 having directly issued such an order to the party to whom it purports to be addressed, but I do recollect that, at or about the time set forth in the date of said order, I had issued a general order to that purport and effect to the general officers next under my command, and, in consequence of my said order, they were authorized to issue the same in my name to the officers under them, in the military heirarchy. The officer in command of the district of Natchez was General Dahlgreen, and to him the order was issued, and accordingly, as I have said before, he was authorized to direct the same in my name to his subordinate officers. I cannot say whether my order was published or not; that was for the officer receiving the order to attend to. Not being a general or-

der for the army, it was not published from my headquarters. I have not in my possession the original of said order, nor of the one which I issued. I have looked for it among the books and papers in my
76 possession, but have not found it.

In answer to the third interrogatory, he says: In the months of May, June, and July, 1862, I was a general in the army of the Confederate States, from the beginning of May to about the fifteenth of June of that year. My command extended over the military district comprising part of Kentucky, the whole of Tennessee, part of Alabama, and part of Mississippi. I exercised command over the greater portion of the State of Mississippi from about the beginning of February to about the middle of June, 1862. At that time, although Natchez was not within the defined limits of my district, Gen'l Dahlgreen, who was in command there, having reported to me for orders, under the emergency I issued orders to him, which was customary in the service.

In answer to the fourth interrogatory, he says: The river referred to must have been the Mississippi River. My orders were general, and embraced all water-courses and railroad-lines.

77 In answer to the fifth interrogatory, he says: The extent and character of my authority was that of a military commander in time of war and public danger. I have already stated the period of its duration.

In answer to the six' interrogatory, he says: I had that authority under the act of the congress of the Confederate States, of March 6th, 1862, and for further information I refer to the letter hereto annexed, and made part of deposition, marked as Exhibit B, said letter dated April 3d, 1867, and signed by Gen'l Thomas Jordan, who, at the time inquired of, was my chief of staff.

In answer to the seventh interrogatory, he says: I know nothing further than what I have testified to above, and what is stated in the letter of General Jordan, in the conclusion of which I fully concur.

In answer to the first cross-interrogatory, he says: My authority was derived from the government of the Confederate States.

In answer to the second cross-interrogatory, he says: At that
78 period of the war that authority was exercised, as in some localities and instances military officers could not be found to fill the post of provost-marshal.

In answer to the third cross-interrogatory, he says: I have stated all that I know on the subject inquired of.

(Signed) G. T. BEAUREGARD.

Sworn to and subscribed before me this 17th of April, 1867.

(Signed) P. CHARLES CUVELLIER,
Commissioner.

And at the same time and place I did cause to come before me Dr. Samuel Choppin, a person of sound mind and above twenty-one years of age, who, being by me duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matter in controversy in the suit aforesaid, in answer to the interrogatories annexed to the commission aforesaid, did depose and say as follows:

In answer to the first interrogatory, he says: I know Mr. James Surget, but not Mr. Washington Ford.

79 In answer to the second interrogatory, he says: I have looked at the paper inquired of. I have no personal knowledge of that particular order, but my recollection is, that at or about the time that

it bears date, such orders were generally given, when the contingency contemplated by it was likely to happen. I am not aware that it was published, or at least do not remember that it was. I have not the original of said order.

In answer to the third interrogatory, he says: During the time inquired of I held the office of medical inspector in the Confederate States army, and was attached to Gen'l Beauregard's staff.

In answer to the fourth interrogatory, he says: I suppose the Mississippi is the river meant, although it might apply as well to any other navigable river in the county, where the contingency contemplated was likely to occur.

In answer to the fifth interrogatory, he says: My authority was over the medical department of the army of Gen'l Beauregard, and began and ceased with that general's.

80 In answer to the sixth interrogatory, he says: Such authority did not appertain to my branch of the service.

In answer to the seventh interrogatory, he says: It is to my knowledge that, in several instances, other parties, owning the cotton which was likely to fall into the hands of the enemy, burnt it themselves.

In answer to the first cross-interrogatory, he says: I have not said that I had such authority.

In answer to the second cross-interrogatory, he says: I know that, in some localities and instances during the war, civilians were appointed as provost-marshals.

In answer to the third cross-interrogatory, he says: I know nothing further.

(Signed) SAM'L CHOPPIN.

Sworn to and subscribed before me this 17th day of April, A. D. 1867.

P. CHARLES CUVELLIER,
Commissioner.

I, Pierre Charles Cuvellier, a commissioner for the State of Mississippi, resident in New Orleans, in the State of Louisiana, duly commissioned and sworn and appointed, in the cause styled in the fore-

81 going caption, to take the depositions of Gen'l G. T. Beauregard and Dr. S. Choppin, witnesses for the defendant in said causes, do certify that I caused to come before me the said G. T. Beauregard and S. Choppin, who, being by me first duly sworn, cautioned, and examined to speak the truth, the whole truth, and nothing but the truth, in answer to said interrogatories and cross-interrogatories did depose thereto; that the answers of said witnesses were reduced to writing by me, in the presence of the said witnesses respectively, by me read to, understood, and approved by the said witnesses respectively, as their deposition in said cause, and by them respectively subscribed in my presence; I further certify that the questions prepounded to the said witnesses respectively, and to which they have answered, are the direct and cross interrogatories accompanying said commission; I further certify that said depositions have in no manner been changed or altered since the same were subscribed by the said witnesses respectively, but that the same have remained in my possession up to the

82 time of sealing and delivering the same, together with the annexed exhibits, commission, and interrogatories, and cross-interrogatories enclosed, and delivering the same to the post-office in this city, directed to the clerk of the said court.

In witness whereof I hereto set my name and official seal this 10th day of April, A. D. 1867.

[SEAL.] (Signed) P. CHAS. CUVELLIER,
Commissioner.

The deposition of Charles G. Dahlgreen, a witness herein, was filed in the clerk's office of said circuit court on the 12th day of September, A. D. 1867, and is as follows, to wit:

Commission for depositions.

STATE OF MISSISSIPPI, *County of Adams:*

The State of Mississippi to Robert W. Wood, justice of the peace in and for said county of Adams, Mississippi, greeting:

83 Know ye that we, trusting to your fidelity and provident circumspection, do give you full power to call and cause to come before you at such time and place as you may appoint, Charles G. Dahlgreen, resident of the State of Louisiana, and witness on the part of defendant, in a certain cause now pending and undetermined in our circuit court of Adams County, State of Mississippi, wherein Washington Ford is plaintiff and James Surget is defendant, and him diligently examine, on oath duly administered, (which oath you are hereby authorized to administer,) touching the matter in controversy, according to the interrogatories hereto attached, and which said examination you will please put down in writing, plainly and distinctly, and the same send to our said court with all convenient speed, under your hand and seal certified, enclosing also this commission.

Witness H. J. Wilkins, clerk of the circuit court of the said county, and the seal thereof, at his office in Natchez, Mississippi, in said county, this 30th day of August, A. D. 1867.

[SEAL.] H. J. WILKINS, *Clerk.*
By LOUIS F. GRIFFIN, *D. Clk.*

84 STATE OF MISSISSIPPI, *County of Adams:*

Circuit court, October term, 1867.

WASHINGTON FORD
vs.
JAMES SURGET. } No. 61.

Interrogatories to be propounded to Charles G. Dahlgreen, a citizen of Louisiana, now temporarily in the said county, whose testimony will be used in behalf of defendant:

1st. Are you acquainted with the parties to this suit?

2d. What office or position did you hold in the State or confederate service in the spring and summer of the year 1862?

3rd. During the month of May, 1862, in whose possession or control, in a military point of view, was the State of Mississippi, and more especially the county of Adams? What officer of the confederate government exercised authority over the people and territory of the county of Adams, if any?

4th. Are you acquainted with Alexander K. Farrar, of said
85 county? Was he exercising any authority or jurisdiction as an

officer of the confederate government in said county, in May, 1862? If you answer affirmatively, state what office and what authority he exercised.

5th. Look upon the annexed copy of a telegram marked X, and state whether you know anything in regard to the issuance thereof, and whether you gave the said Farrar any such orders; and, if not, why?

6th. State all you may know touching any general orders or telegrams from any military commanders of the confederate army in May, 1862, touching the destruction of cotton along the Mississippi River, including the county of Adams, which cotton might be liable to fall into the hands of the Federal forces.

7th. Was the article of cotton, during the late war, treated and regarded by the Federal authorities and commanders as private property in the conducting of the late war, or was it treated and regarded by them in a different manner; and, if so, how?

86 8th. Was there any law or enactment of the congress of the Confederate States authorizing the military authorities or officers to destroy cotton likely to fall into the hands of the adverse forces? If aye, state what law, giving date and copy thereof.

9th. State anything further you may know to the advantage of the defendant.

WINCHESTER & NORTH AND MARTIN,
Att'ys for Def't.

Copy X.] MAY 2*d*, 1862.

[By telegram from Corinth, 2, 1862.]

To A. K. FARRAR, *Provost Marshal:*

In conjunction with the gov. of Mississippi, will forthwith burn all cotton likely to fall into the hands of the enemy along the river and railroad.

(Signed) G. T. BEAUREGARD.

The undersigned, att'ys for plaintiff, hereby agree that a commission may forthwith issue, waiving affidavit, directed to any justice of the peace in Louisiana or Mississippi, or take the deposition and answers to the foregoing interrogatories and annexed cross-interrogatories,

87 hereby reserving all legal exceptions in the premises.

THACHER & GUICE,
Att'y for Pl'ff.

THE STATE OF MISSISSIPPI, *Adams County:*

In the circuit court thereof, to October term, 1867.

WASHINGTON FORD
vs.
JAMES SURGET.

Cross-interrogatories to be propounded to Charles G. Dahlgreen, the answers to which, when taken, to be read on the part of plaintiff in this cause, upon the trial thereof.

1st x-int'y. In the month of May, 1862, was or was not the civil government of the State of Mississippi, under its constitution and laws, in full force and authority, and was or was not the military authority at

that time subordinate to, and in aid of, the civil authorities of said State of Mississippi?

2d x-int'y. In the month of May, 1862, had or had not martial law been declared by the so-called government of the Confederate States, in the county of Adams, State of Mississippi? And if yea, please
88 append to your answer a copy of the order to that effect.

3rd x-int'y. If in answer to 3rd direct interrogatory you answer that any one had, as an officer of the so-called confederate government, authority over the people and territory of the county of Adams, Mississippi, please state during the month of May, 1862, where his headquarters were, and whether his headquarters were changed from time to time; and if so, the date and place of said changes. Please state, also, whether or not during said month of May, 1862, there was any authorized body of confederate troops or soldiers in said county of Adams; and, if there was, was not the sole object of their being there to recruit the army of the Confederate States?

4th x-int'y. Was there any federal army threatening the subjugation and occupation of the county of Adams during the month of May, 1862; and if there was, was it not simply an ascent and descent of the Mississippi River by a few vessels of war, and did or did not you
89 and many other citizens view their ascent and descent of said river, without being molested by them; and did or did not these officers or men at that time interfere with, or molest, in the county of Adams, peaceable persons, or their property?

5th x-int'y. If you state in answer to 4th direct interrogatory that A. K. Farrar was acting in any capacity as an officer of the confederate government during said month of May, 1862, please state if you have a personal knowledge of his appointment; and if yea, who by, and whether by an order of any general, and who.

6th x-int'y. If you answer affirmatively to 5th direct interrogatory, please state whether you know said facts personally, or did you learn them by information from others?

7th x-int'y. Was or was it no the policy of the Federal Government during the year 1861, and the first half of the year 1862, to respect private rights and private property, as well in cotton as in other property?

8th x-int'y. Are you or not well acquainted with the county of
90 Adams, and its citizens; and do you not know that during the month of May, 1862, no cotton was taken or destroyed by the United States forces, or before that time, or during the year 1862, in said county of Adams?

9th x-int'y. Do you or not know, by our own knowledge, or by information derived from Surget, defendant, that the said defendant kept and preserved from seizure by the Federal authorities a large lot of cotton in said county of Adams, through the whole late war up to the occupation of the city of Natches, by the Federal forces, in July, 1863; and did he or not sell the same after said occupation and get the benefit thereof; and do you or not know that many citizens of the county of Adams, in sympathy with the late rebellion, held and kept their cotton free from seizure, and sold and received the money therefor by the permission of the Federal authorities?

10th x-int'y. If you know anything further beneficial to the plaintiff, please state it.

(Signed) THACHER & GUICE,
And G. M. DAVIS,
Att'ys for Pl'ff.

91 THE STATE OF MISSISSIPPI,
Adams County, ss:

Deposition of witness Charles G. Dahlgreen, taken before me this eleventh day of September, one thousand eight hundred and sixty-seven, at my office at the court-house in the city of Natchez, county of Adams, and State of Mississippi, pursuant to annexed commission, issuing out of the circuit court of the said county of Adams, State of Mississippi, in the suit of Washington Ford, plaintiff, vs. James Surget, defendant.

CHARLES G. DAHLGREEN, being duly sworn, deposeth and saith:

1st interrogatory. Yes.

2d interrogatory. In confederate service I commanded the department both sides the Mississippi River, including Adams County, Miss.

3d interrogatory. Adams County was under the control of the confederate government. I exercised authority.

4th interrogatory. Alexander K. Farrar exercised authority as provost-marshal of Adams County in confederate service.

92 5th interrogatory. I have no knowledge of the issuing of such telegram, and gave no order to said Farrar.

6th interrogatory. I received orders at that period from authority at Richmond, or received as from my superior officer, Gen'l Beauregard, to burn all cotton liable to fall into hands of enemy.

7th interrogatory. The Federal authorities made no distinction. They took cotton and everything else whenever and wherever they could.

8th interrogatory. There was such law; copy was sent to me. I cannot state date, nor give copy, as all of my papers were destroyed by enemy.

9th interrogatory. I know further of advantage to defendant.

(Signed) C. G. DAHLGREEN.

Answers to cross-interrogatories.

1st x-interrogatory. I was absent from Adams County at period mentioned with the army until I took command in Adams County; when I declared martial law, and all civil authority ceased. The condi-

93 tion of the laws prior to that I do not know of.

2d x-interrogatory. It has been so declared, as stated above. I cannot give copy, as all my papers were destroyed, as stated.

3d x-interrogatory. My headquarters were changed from time to time, whenever the exigency of my command required. They were at Natchez, Washington, Rodney, Waterproof, &c. There was a regular and legal organized body of confederate troops in said county of Adams for purposes of war, and not for recruiting army of confederacy.

4th x-interrogatory. There was a Federal army threatening subjugation of Adams County at period stated. The single ascent and descent of the Mississippi River by vessels of war unconnected with other operations would have been of very little moment. I received them from the bluff at Natchez and elsewhere unmolested, because they had no power otherwise. Upon their arrival at Natchez they demanded its surrender; landed an armed force, took military possession, and com-

94 mitted spoilations; they robbed, burned towns, plundered, and committed depredations, without regard to persons, in county of Adams as well as vicinity.

5th X interrogatory. A. K. Farrar was appointed by Gen. Bragg, I

believe. I have no personal knowledge of it. I confirmed the appointment upon taking the command.

6th X interrogatory. As stated before, I have knowledge of said telegram.

7th X interrogatory. No; they respected nothing when they had power.

8th X interrogatory. I am well acquainted, as asked. I cannot remember of Adams County in particular, but the enemy took cotton from other portions of my command at period referred to, after my removal from command.

9th X interrogatory. Of operations of Surget I know nothing, nor of citizens of county of Adams, as asked.

10th X interrogatory. I know nothing further.

(Signed) C. G. DAHLGREEN.

STATE OF MISSISSIPPI, *Adams County, ss:*

95 I, Robert W. Wood, a justice of the peace in and for said county of Adams and State of Mississippi, hereby that Charles G. Dahlgreen was produced before me and duly sworn and examined; and that he, the said Charles G. Dalgreen, did, in my presence, reduce to writing his answers to the interrogatories and cross-interrogatories; that the same are hereunto annexed, and are the answers of the said witness; and that he signed the same in my presence.

In witness whereof I have hereunto signed my name and affixed my private seal of office, at Natchez, this 11th day of September, A. D. 1867.

(Signed) RO. W. WOOD, *J. P.*, [SEAL.]
Justice of the Peace.

Telegrams and printed order of provost-marshal were submitted by defendant as evidence herein, as follows, to wit:

APRIL 26TH, 1862.

[By telegraph from Jackson, 1862.]

To Hon. A. K. FARRAR:

96 You will immediately, on the receipt of this, proceed to remove from Natchez such stores, materials, machinery, &c., as may be of value to the government.

Avail yourself of such transportation as may be at hand to forward the stores, materials, &c., to Vicksburg, for transportation by rail to the interior. I hereby confer on you full power for the accomplishment of the object as above mentioned.

(Signed) JOHN J. PETERS.

MAY 2D, 1862.

[By telegraph from Corinth, 2, 1862.]

To A. K. FARRAR & D. L. RIVERS,
Provost-Marshals, Adams Co'y:

If the patriotism of the planters will not inspire them to burn their cotton liable to seizure by our enemy, it is the duty of provost-marshals to burn it.

(Signed) G. T. BEAUREGARD.

MAY 2D, 1862.

[By telegraph from Corinth, 2, 1862.]

To A. K. FARRAR,
Provost-Marshal:

97 In conjunction with the gov. of Mississippi, will forthwith burn all cotton likely to fall into the hands of the enemy along the river and railroad.

(Signed) G. T. BEAUREGARD.

MAY 3RD, 1862.

[By telegraph from Jackson, 3rd, 1862.]

To C. K. FARRAR:

Burn all the cotton in reach of the enemy. Gun-boats reported coming up.

(Signed) JNO. J. PETERS.

MAY 3D, 1862.

[By telegraph from Jazson, 3, 1862.]

To A. K. FARRAR:

The following despatch has just been rec'd from Gen'l Beauregard, to be sent to officer in command:

"In conjunction with the governor of Mississippi, will forthwith burn all cotton likely to fall into the hands of the enemy along the river and railroad.

(Signed) "G. T. BEAUREGARD."

98 You will at once proceed to execute the above order.

(Signed) JOHN J. PETERS.

PROVOST-MARSHAL'S OFFICE,
Natchez, May 6th, 1862.

The enemy is now approaching in such force as we here are not prepared to resist. One of his first and most important objects will be to get possession of cotton.

Patriotism, duty to our country and to our cause requires that we should spare no effort to defeat him in this purpose. The law requires that cotton liable to be seized by the enemy shall be destroyed. I therefore, in my official capacity, and acting under express orders, issue this my order to all owners of cotton within my jurisdiction, imperatively requiring of them that they burn all of their cotton in reach of the enemy.

This to be done immediately.

99 And if the enemy shall establish a garrison at this place, or in this county, then the owners are hereby required to burn all their cotton in time sufficient to insure its destruction before its possible seizure.

This order is addressed to owners of cotton, and will not be held as giving authority to any other persons to burn cotton. All others than owners are forbidden to do so, unless expressly authorized.

I earnestly appeal to the patriotism of the owners to apply the torch themselves or have it done. Any one who shall refuse, or fail to do so, cannot be regarded otherwise than as a recreant to the cause of independence and his country in her hour of trial, and as giving aid to the

enemy. And such proceedings will be had as the saf'ty of the country may require.

A. K. FARRAR,
Provost-Marshal.

[Daily Courier, print.]

Instructions are presented to the court for the purpose of being submitted to the jury herein, as follows, to wit:

100 1. The court instructs the jury that if the jury believe from the evidence in the case that the defendant burnt and otherwise destroyed the cotton of plaintiff without any lawful authority or legal justification, then such destruction of plaintiff's property renders the defendant liable to the plaintiff for the amount of the damage thus sustained.—(Given.)

Given by the court.

HENRY J. WILKINS, *Clerk.*
LOUIS F. GRIFFIN, *D. C.*

2. That if the jury believe from the evidence that such destruction of plaintiff's cotton by the defendant was wilfull and malicious, and without legal justification, then the measure of damages is not restricted to the actual value of the cotton at the time of its destruction, but they in such case may estimate the damages of the plaintiff at the highest market-value of the cotton so destroyed, at any time between the date of its destruction and the date of the commencement of this suit, according to the proof before them of such market-value.—(Given.)

Given by the court.

HENRY J. WILKINS, *Clerk.*
LOUIS F. GRIFFIN, *D. C.*

101 3. The law which in 1862 authorized the destruction of cotton conferred that power on commanders of confederate forces, within certain limits, to wit, they were only authorized to burn cotton likely to fall into the hands of the enemy, which could not be removed out of such danger.—(Refused.)

Refused.

H. J. WILKINS, *Clerk,*
LOUIS F. GRIFFIN, *D. C.*

4. That whatever may have been the authority conferred on Farrar, or by whomsoever conferred, it could not lawfully extend beyond the powers conferred by the act of the confederate government as a belligerent, and if he ordered cotton to be burnt otherwise than as required by that law, and in violation of its provisions, his orders to that extent were null and void, and no one was bound to obey them, nor could such orders amount to any justification or protection to any one from liability for damages occasioned by such unauthorized act.—(Refused.)

Refused.

H. J. WILKINS, *Clerk,*
By LOUIS F. GRIFFIN, *D. C.*

5. If the jury believe from the evidence that A. K. Farrar had any authority to issue orders for the burning of cotton, such authority could not extend beyond issuing orders for the burning of cotton likely to fall into the hands of the enemy of the belligerent force under which he was acting.—(Refused.)

Refused.

H. J. WILKINS, *Clerk,*
By LOUIS F. GRIFFIN, *D. C.*

102 6. The order issued by A. K. Farrar to John Minor and James Surget, read in evidence to the jury, is in its legal effect an order to them to burn the cotton on the places mentioned which may be likely to fall into the hands of the enemy, and if such cotton was not likely to fall into the hands of the enemy in the judgment of said Minor and Surget, then said Minor and Surget were not authorized to burn the cotton on either of the places named in said order.—(Refused.)

Refused.

H. J. WILKINS, *Clerk*,
By LOUIS T. GRIFFIN, *D. C.*

7. If the jury believe from the evidence that, at the time of the burning of said cotton by defendant, it was in process of removal to a place of security, where it would not have been likely to fall into the hands of the enemy, and said Minor and Surget had no reason to believe, and did not believe, it was in danger of falling into the hands of the enemy, but would have been safe from the enemy in such place to which it was in process of removal, and the defendant, notwithstanding such
103 belief, burnt the said cotton, then such order is no justification or defence for such burning, and they should find for the plaintiff on the issues setting up such defence.—(Refused.)

Refused.

H. J. WILKINS, *Clerk*,
By LOUIS F. GRIFFIN, *D. C.*

8. If the jury believe from the evidence that Minor and Surget were entrusted jointly with discretionary powers to burn or not to burn cotton on the places named in the order from A. K. Farrar to them, and read in evidence, as they might jointly determine was likely to fall into the hands of the enemy, or not likely to fall into the hands of the enemy, then such discretion could only be jointly exercised by them, and neither Minor nor Surget could by himself exercise such discretion. (Refused.)

Refused.

H. J. WILKINS, *Clk*,
By LEWIS F. GRIFFIN, *D. C.*

And now at this day, to wit, the 15th day of October, 1868, being the fourth day of the October term of said court, the proceedings were had herein as follows, to wit:

WASHINGTON FORD
vs.
JAMES SURGET.

104 This day came the parties by attorneys, and a jury being called, comes as follows, to wit:

1. T. C. POLLOCK.
2. JOHN KOERBER.
3. F. B. FAUNTLEROY.
4. P. WALSH.
5. R. P. MILLER.
6. I. HARGRAVES.
7. L. MARRON.
8. ROBERT WELLS.
9. GEORGE ROBERTSON.
10. F. F. FOWLER.
11. C. CECIL.
12. D. MICHIE.

Who, being duly empanneled and sworn the issue joined to try, after hearing testimony, were allowed to disperse under instructions of the court until 9 o'clock to-morrow morning.

And now at this day, to wit, the 16th day of October, 1868, being the fifth day of October term A. D. 1868 of said court, proceedings were had herein as follows, to wit:

105 WASHINGTON FORD } 13.
vs.
JAMES SURGET. }

This cause being this day duly argued by counsel, and submitted to the jury with instructions of the court, the jury retired to their room to consider of their verdict.

And now at this day, to wit, the 17th day of October, 1868, being the sixth day of the October term, A. D. 1868, of said court, proceedings were had herein, as follows, to wit:

WASHINGTON FORD } 13.
vs.
JAMES SURGET. }

The jury in this case having returned into court, rendered the following verdict herein: "We, the jury, upon our oaths do say that we find for the defendant."

Thereupon it is considered and adjudged by the court now here that the defendant do have and recover of and from the plaintiff all
106 costs and charges herein expended to be taxed, and that execution issue therefor.

On this day, to wit, the 28' day of May, A. D. 1869, comes the plaintiff herein, Washington Ford, by his attorney, and files in the clerk's office of the said circuit court his petition for a writ of error to the high court of errors and appeals, as follows, to wit:

Circuit court, Adams County.

WASHINGTON FORD }
vs.
JAMES SURGET. }

To A. C. Hussey, clerk of the circuit court, Adams County, Miss.:

STATE OF MISSISSIPPI, *Adams County, ss:*

Whereas at the October term of said Adams County circuit court, in the year A. D. 1868, judgment was rendered in the above-entitled cause in favor of the said defendant, James Surget, against the said plaintiff, Washington Ford, and that the said defendant have and
107 recover of said plaintiff all costs and charges therein expended to be taxed; and whereas, in the records and proceedings in said cause and in the final judgment therein, manifest errors have occur'ed: Now, therefore, the said plaintiff, Washington Ford, hereby petitions for a writ of error in this behalf to the high court of errors and appeals of the State of Mississippi.

(Signed) L. W. PERCE,
Att'y for Pl'ff.

On the same day, to wit, the 28th day of May, 1869, came the said plaintiff, Washington Ford, with H. Polkinghorns and M. Lemly, his

surities, and files in the clerk's office of the said circuit court his bond for costs that may accrue, in the high court of errors and appeals, as follows, to wit:

Know all men by these presents that we, Washington Ford,
108 principal, and H. Polkinghorns and M. Lemle, surities, all of the city of Natchez, county of Adams and State of Mississippi, are held and firmly bound unto James Surget, of the county of Adams aforesaid, his heirs, executors, administrators, and assigns, in the just and full sum of one hundred dollars, lawful money of the United States; for which sum, well and truly to be paid, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seales, dated the 28th day of May, A. D. 1869.

The condition of the above obligation is such, that w'ereas the said Washington Ford has filed with the clerk of the circuit court in and for said Adams County his petition for a writ of error to the high court of errors and appeals of said State of Mississippi, upon the final judgment entered in said court at its October term, 1868, in the cause entitled, Washington Ford, plaintiff, vs. James Surget, defendant,
109 and numbered thirteen on the docket of said court; and whereas the said writ is issued as prayed for in said petition, and the said suit is founded upon cause made and incurred prior to the first day of June, A. D. 1865:

Now, therefore, if the said Washington Ford shall prosecute the said writ of error to effect, or, in case of failure so to do, shall pay and perform any judgment or decree of the said high court of errors and appeals, and pay any and all costs therein accruing by reason of said writ and failure aforesaid, then this obligation to be void and of no effect; otherwise to remain in full force and virtue.

(Signed) WASHINGTON FORD. [SEAL.]
H. POLKINHORN. [SEAL.]
M. LEMLE. [SEAL.]

110 THE STATE OF MISSISSIPPI.

STATE OF MISSISSIPPI, *Adams County*, ss.

To the honorable the judge of the circuit court of the first judicial district of the State of Mississippi, greeting:

Whereas, at a circuit court begun and held in the city of Natchez, within and for said county, James Surget, defendant, by the judgment of said court, recovered against Washington Ford, plaintiff, late of said Adams County, as well the sum of dollars and cents, of damages, which had sustained, as the sum of two hundred and fifteen dollars and eighty-three cents, for all costs and charges by and about this suit in that behalf laid out and expended, whereof the said Washington Ford, plaintiff, was convicted, as it is said; and because in the record and proceedings as also in the rendition of said judgment a manifest error hath happened, to the great damage of the said
111 Washington Ford, plaintiff, as of his complaint hath been stated:

Therefore you are hereby commanded that, if the judgment of aforesaid be therein given, then the record and proceedings aforesaid, with all things thereunto relating to the high court of errors and appeals for said State, on the third Monday in October, A. D. 1869, under your seal, distinctly and openly, you send, together with this writ, that the record and

proceedings aforesaid, being inspected, the said court may further cause to be done therein for the correcting that error what of right and according to the laws and customs of the State may be done.

Issued 28th day of May, A. D. 1869.

[SEAL.]

M. A. C. HUSSEY,
Clerk of Adams Circuit Court.

112 STATE OF MISSISSIPPI, *Adams County:*

I, M. A. C. Massey, clerk of the circuit court in and for said county, State aforesaid, do hereby certify that the foregoing seventy-six pages and fourteen lines contain a true and perfect transcript of the papers on file and proceedings had in the within cause, wherein Washington Ford is plaintiff and James Surget is defendant, as the same remain in my office, in the city of Natchez, county of Adams, State aforesaid.

Witness my hand and the seal of the said circuit court, this 22d day of June, A. D. 1869.

[SEAL.]

M. A. C. HUSSEY, *Clerk.*

113 And on the 26'day of October, A. D. 1869, the following citation was filed in the office of the clerk of the high court of errors & appeals, as follows, to wit:

THE STATE OF MISSISSIPPI, *Adams County:*

To the sheriff of said county, greeting:

Whereas in a certain case pending and tried at the October term, 1868, of the circuit court of Adams County, and State aforesaid, wherein Washington Ford, plaintiff, and James Surget, defendant, judgment was rendered against said plaintiff for the sum of two hundred and fifteen dollars and eighty-three cents, costs of suit; and whereas also it hath been alleged by said plaintiff that, in the record and proceedings in said cause, manifest errors have occurred, and he, having filed in our said court petition for a writ of error in this behalf to the high court of errors and appeal of the State of Mississippi, which
114 has been granted on his entering into bond, conditioned and approved of as by the statute in such case made and provided:

You are, therefore, hereby commanded to cite the defendant in the court below to be and appear at the next term of the high court of errors and appeals of State aforesaid, to be holden at the city of Jackson on the 3rd Monday in October next, then and there to answer to said writ of error, and have you then and there this writ.

Issued 22nd day of June, 1869.

[SEAL.]

M. A. C. HUSSEY,
Clerk of Adams Circuit Court,
By V. WOOD, *Dep. Clerk.*

[Endorsed thereon is the following, to wit:]
Received June 30th, 1869.

W. NOONAN, *Sh'ff,*
By FRANK J. ARAIGHI, *D. S.*

Executed the within citation personally of Josiah Winchester,
115 attorney in fact, for James Surget, July 19th, 1869, and true copy thereof delivered to him.

W. NOONAN, *Sheriff,*
By FRANK J. ARAIGHI, *D. S.*

And the following entries appear in the minutes of the high court of errors and appeals of the State of Mississippi, as follows, to wit:

State of Mississippi, high court of errors and appeals, October term, 1869—Wednesday, Feb'y 23rd, 1870.

WASHINGTON FORD
vs.
JAMES SURGET.

Submitted on record and brief by Messrs. Winchester and North for def't in error.

State of Mississippi, high court of errors and appeals, October term, A. D. 1869—Wednesday, March 14th, 1870.

WASHINGTON FORD
vs.
JAMES SURGET.

On motion, made orally, by Mr. Withers, of counsel for defendant in error, ordered that the order of submission heretofore taken in
116 this case be set aside, and that this cause be remanded to the docket and continued.

And the following entries appear on the minutes of the supreme court of Mississippi, as follows, to wit:

State of Mississippi, supreme court, May sp'l term, A. D. 1870—Wednesday, June 22nd, 1870.

WASHINGTON FORD
vs. 12108.
JAMES SURGET.

Continued.

117 And afterwards, to wit, on the 27 day of February, A. D. 1871, the following assignment or errors was filed in the office of the clerk of the supreme court:

State of Mississippi, supreme court, October term, 1870.

WASHINGTON FORD
vs. 12108.
JAMES SURGET.

And the plaintiff in error, by att'y, comes and says, and in his record and proceedings had herein in the circuit court of Adams County there is manifest error to his prejudice, in this, to wit:

1. The court erred in overruling the several demurrers filed by plaintiff to the several special pleas filed by defendant.
2. The court erred in referring the 3, 4, 5, 6, 7, & 8th instructions altered by plaintiff.
3. There are other errors which will be specially assigned at the hearing.

YERGER,
For Plaintiff in Error

118 And the following entries appear on the minutes of the supreme court of Mississippi, as follows, to wit:

State of Mississippi. Supreme court. October term, A. D. 1870. Tuesday, Feb. 28th, 1871.

WASHINGTON FORD
vs. } 12108.
JAMES SURGET.

Argument by Mr. Yerger, for plaintiff in error, and by Mr. Winchester, for defendant in error.

State of Mississippi. Supreme court. October term, A. D. 1870. Wednesday, M'ch 1st, 1871.

WASHINGTON FORD
vs. } 12108.
JAMES SURGET.

Argument by Mr. Yerger, for plaintiff in error, concluded, and this cause submitted on brief by Mr. Yerger, for plaintiff in error, and by Messrs. Winchester and North, for defendant in error.

119 State of Mississippi. Supreme court. October term, A. D. 1871. March 18, 1872.

WASHINGTON FORD
vs.
JAMES SURGET.

This cause having been submitted at a former day of this term, upon the record herein from the circuit court of Adams County, and this court having sufficiently examined and considered the same, and being of the opinion that there is no error therein, doth order and adjudge that the judgment of said court, rendered in this cause at the October term thereof, A. D. 1868, be and the same is hereby affirmed.

And it is further considered, and so ordered and adjudged by this court, that the defendant in error do have and recover of the plaintiff in error, and H. Polkinghorn and M. Semle, sureties in the writ-of-error bond, the costs of this cause in this court expended, &c., to be taxed, &c.

120 And on the 10th day of November, A. D. 1872, the following writ-of-error bond was filed in the office of the clerk of the supreme court of the State of Mississippi, as follows, to wit:

Know all men by these presents that we, Washington Ford, R. E. McClure, and Geo. Schwartz, all of the city of Natchez, county of Adams, Mississippi, are held and firmly bound to James Surget, in the full and just sum of two hundred and fifty dollars, to be paid to the said James Surget, his certain attorney, executor, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals and dated this fifth day of October, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas, lately, at a term of the supreme court of Mississippi, in a suit depending in said court between Washington Ford, plaintiff, and

James Surget, defendant, judgment was rendered against the said Washington Ford; and the said Washington Ford having ob-
121 tained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said James Surget, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such that, if the said Washington Ford shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WASHINGTON FORD. [L. S.]
R. E. McCLURE. [L. S.]
GEORGE SCHWARTZ. [L. S.]

Sealed and delivered in presence of—
FRED. PARSONS.

Approved by—

STATE OF MISSISSIPPI, *Adams County, ss:*

I, the undersigned justice of the peace of said county, do
122 hereby certify that on this 2nd day of November, 1872, before me appeared R. E. McClure and Geo. Schwartz, to me known to be the persons who executed the within bond, who, being by me first duly sworn each for himself, deposed and said that he was worth the sum of five hundred dollars over and above all debts and liabilities due or owing by him, and over and above property exempt from execution, and under the laws of said State.

Witness my hand and seal this 2nd day of November, 1872.

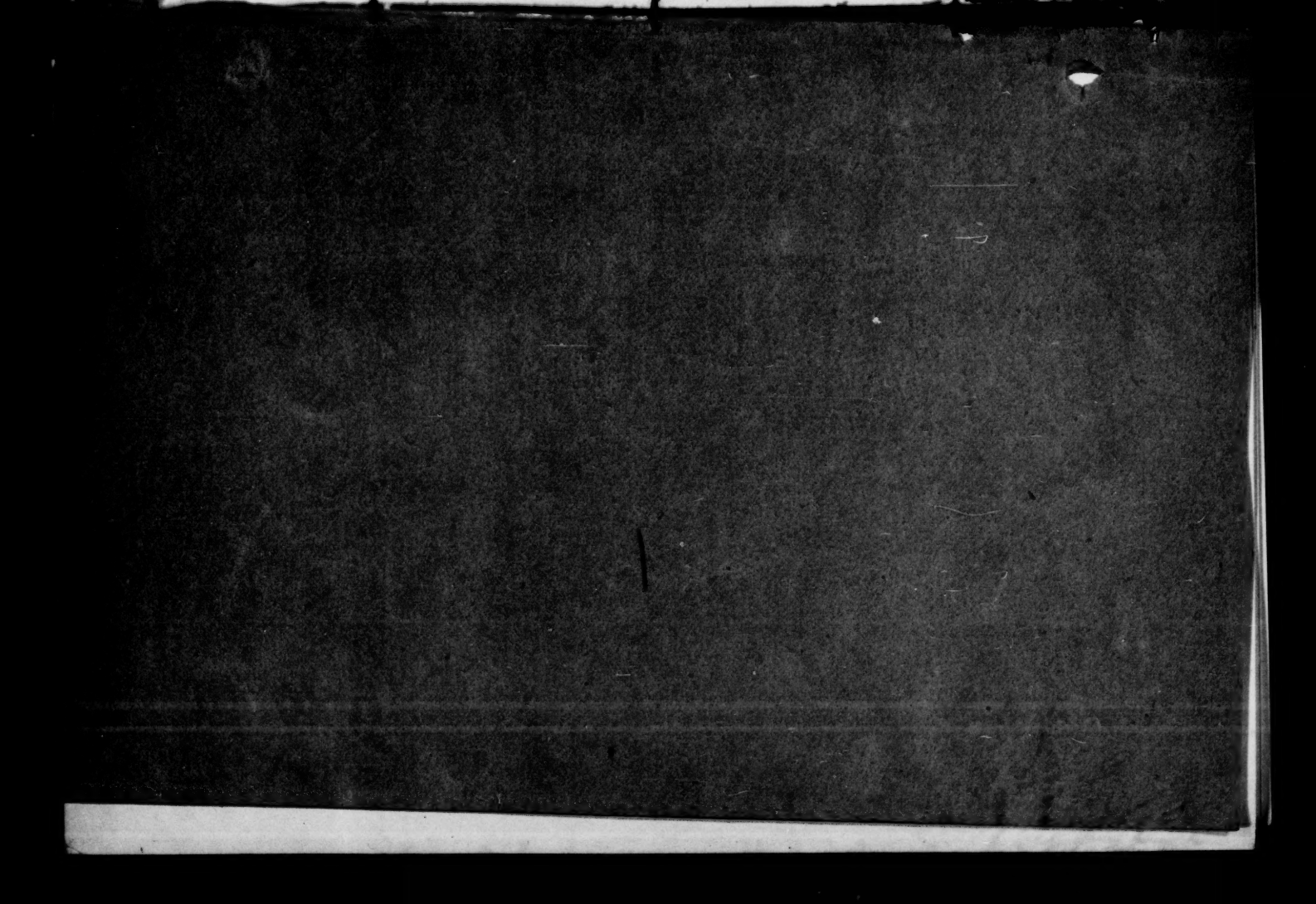
FRED. PARSONS, *J. P.* [SEAL.]

I, James M. McKee, clerk of the supreme court of the State of Mississippi, do hereby certify the above and foregoing one hundred and twenty-two pages (122) contain a true, full, and perfect transcript of all the record, pleas, process, proceedings, and judgments in a case lately pending in the supreme court, wherein Washington Ford was
123 plaintiff in error and James Surget defendant in error, numbered on our supreme court docket 12108, as fully and plainly as the same appear of record and on file in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the State of Mississippi, at office in Jackson, Miss., this 16th day of September, A. D. 1873.

[SEAL.] JAS. M. McKEE, *Clerk.*

(Indorsement on cover:) No. 226. Washington Ford, plaintiff in error, vs. James Surget. Mississippi sup. court. Filed 11th October, 1873.



United States Supreme Court.

NO. 5.—OCTOBER TERM, 1877.

WASHINGTON FORD, PLAINTIFF IN ERROR.

vs.

JAMES SURGET, DEFENDANT IN ERROR.

Brief for Plaintiff in Error.

BENJ. F. BUTLER, R. D. MUSSEY, *of Counsel.*

STATEMENT OF FACTS.

In May, 1862, in Adams county, Mississippi, the Defendant burned 200 bales of cotton, belonging to the Plaintiff.

October 2d, 1866, the Plaintiff brought suit against the Defendant for this destruction of his property, in the Adams County Circuit Court, claiming $120,000 damages. (R., pp 4 and 5.)*

October 22, 1866, the Defendant appeared and filed three pleas:

The *first* is, the General Issue.

The *second*, is an elaborate special plea, setting up as justification, that the Defendant burned the cotton in obedience to an order of the Confederate States, through General Beauregard and the Acting Provost Marshal of Adams county, one Farrar.

* Here, as elsewhere in this brief, the references are to the pages of the *Printed* Transcript of Record.

The *third* justifies the act by setting up obedience to the the orders of the

> Government of theConfederate States of America, a belligerent and separate government at the time of the burning, then having and exercising full and unlimited control, authority and jurisdiction by force of arms and in time of war, over the territory, property, and inhabitants of said State of Mississippi, and then at war with the Government of the United States. (R., pp. 6, 7.)

December 18, 1866, the Plaintiff demurred to these pleas, assigning six grounds of demurrer. Four of these are based on the general rules of pleading.

The third and fourth are as follows :

> 3. That the matters in said plea contained attempt to create issues hostile to the supremacy of the United States, to the constitution and laws of the State of Mississippi, and subversive of peace and good order, and contrary to public policy.
>
> 4. That the defenses sought to be made in said plea are not warranted or sustained by the laws of nations nor the laws of war. (R. pp. 8, 9.)

April 8, 1867, upon leave, the Plaintiff filed a second count to his Declaration, charging that the Defendant did the burning "wilfully, wantonly, and maliciously." (R., p. 10.)

April 26, 1867, the Demurrer was overruled, and leave granted to file additional pleas. (R. p. 10.)

August 6, 1867, the Defendant filed three pleas to the second count of the Declaration.

> The *first* is the general issue.
>
> The *second* and *third* are similar to the second and third filed to the first count, as given *supra*. (R., pp. 11 and 12.)

Upon the same day, the Defendant filed two pleas to the entire Declaration, called in the Record the "4th and 5th Pleas," setting up the same justification of obedience to the orders of the Confederate Military Commander, through the

Provost Marshal; and further, that the Confederate States constituted a separate government, "composed and consti- "tuted by executive, legislative, and judicial departments," and that

> On the 6th day of March, A. D. 1862, and by act approved and promulgated on that day, the legislative power of the said Confederate States of America, to wit, the Congress of the Confederate States of America, had enacted that it should be the duty of all military commanders in the service of the said Confederate States to destroy all cotton, tobacco, or other property that might be useful to the enemy, to wit, the forces of the said United States of America, whenever in their judgment the same should be about to fall into their hands.

And that the Defendant burnt Plaintiff's cotton—

> In obedience to and in pursuance of said act of said Congress of the Confederate States, and the said orders of the said military commander and provost marshal. (R., pp. 13 to 15.)

To these Pleas the Plaintiff demurred, assigning *inter alia* these grounds:

> 5. Said defendant in his said pleas seeks to rely, for justification of the trespasses committed by him, upon matters in themselves wholly illegal, against peace and good policy, and contrary to the Constitution of the United States, the supreme law of the land, and the Government thereof.
>
> 6. Said defendant, in and by his said pleas, does not show that he acted otherwise than voluntarily and gratuitously—not being in the military or naval service of said Confederate States.

On the same day, the Defendant filed two other special pleas, setting up, in substance, though with some variation of verbal statement, the same justification, viz:

that the act was done pursuant, and in obedience to,

the requirements of the "separate" and "belligerent" Government of the Confederate States, expressed through orders from General Beauregard and Provost Marshal Farrar.

To these pleas also the Plaintiff demurred, assigning grounds similar to those above given. (R., pp. 16 to 18.)

Issues being made up, on the 29th of April, 1868, the court overruled the demurrers and gave leave to answer.

Thereupon the Plaintiff filed his replications to those pleas, in respect of which the demurrers had been overruled, and a trial was had, which, October 16, 1868, resulted in a verdict for Defendant, on which Judgment was entered.

In the Transcript are sundry depositions and Prayers for Instructions, with the action of the Court upon them. (R., pp. 22 to 37.)

After verdict the case was removed by proceedings in error to the High Court of Errors and Appeals of the State, where, on the 18th of March, 1872, the Judgment of the Circuit Court for Adams county was affirmed. (R., p. 42.)

On the 25th of August, 1873, the Plaintiff petitioned for a Writ of Error to this Court, under the provisions of Sec. 709 of the Rev. Stats. (25th section of the Judiciary Act.) The petition and writ were allowed in due form.

WE ASSIGN FOR ERROR

that the Supreme Court of Mississippi sustained the Circuit Court in overruling the several Demurrers filed by the Plaintiff to the Defendant's Pleas, and in refusing to grant the instructions to the Jury asked in the 3d, 4th, 5th, 6th, 7th, and 8th prayers by the Plaintiff.

Before discussing these errors in detail, it is proper that we should consider the preliminary question of Jurisdiction—a question always carefully scanned by this Court when it is asked to review the action of a State Court.

JURISDICTION.

The Plaintiff contends that every requirement to give jurisdiction under the statute is met.

The High Court of Errors and Appeals of the State of Mississippi was the highest court of Law or Equity in that State, in which a decision could be had in this suit.

And it is clear that the Federal Question presented by the Plaintiff's Demurrers to the Defendant's Special Pleas, and by his Prayers for Instructions, was presented to and passed upon by that court.

Our assignment of errors is almost a literal copy of that presented there. (R., p. 41.)

The opinion of that Court was originally appended to the Plaintiff's petition in error asking a removal here; in some way it has become detached from the Record. It is appended to our Brief as *Appendix A.* But an inspection of that opinion is not needed to show that the Federal Question raised in the pleadings was passed upon, for the Demurrers could not have been overruled by the Circuit Court without passing upon it, and the Supreme Court upheld the action of the Circuit Court.

In *Crowell* v. *Randall,* (10 Peters, 368,) Mr. Justice Story reviews, elaborately, the practice of this Court in relation to cases brought before it under this section of the Judiciary Act.

> He says: It has been uniformly held that to give the Court appellate jurisdiction two things should have occurred, and be apparent in the record: *First*, That some one of the questions cited in the section did arise in the court below; and, *secondly*, that a decision was actually made thereon by the same court, in the manner required by the section. * * * *
> It is not indispensable that it should appear on the record *in totidem verbis*, or by direct and positive statement that the question was made, and the decision given by the court below on the very point; but it is sufficient, if it is clear from the facts stated, by just

and necessary inference, that the question was made and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment.

In one of the cases cited by Justice Story, (4 Peters, 410,) Chief Justice Marshall says:

> There has been a perfect uniformity in the construction given by this court to the 25th section of the Judiciary Act; that construction is, that it is not necessary to state in terms in the record that the Constitution or a treaty or a law of the United States has been drawn in question or the validity of a State law on the ground of its repugnance to the Constitution. It is sufficient if the record shows that the Constitution or a treaty, or a law of the United States might have been construed or that the constitutionality of a State law must have been questioned; and the decision has been in favor of the party claiming under such law.

Mr. Justice Story concludes his exhaustive review of the cases occurring under this section with this statement of the interpretation, which has been constantly maintained by this Court, viz:

> *First*, that some one of the questions stated in that section did arise in the State court; *Second*, that the question was decided by the State court as required in the same section; *Third*, that it is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms *ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised and must have been decided in order to have induced the judgment; *Fourth*, that it is not sufficient to show that a question might have risen or been applicable to the case, unless it is further shown on the record that it did arise and was applied by the State court to the case.

From this construction of its jurisdiction under this section of the Judiciary Act there has been no variation by this Court. All the later cases have simply reiterated the principles enunciated in this opinion.

The action of the State Courts in overruling the demurrer to the pleas is necessarily an affirmation of the validity of those pleas, both in respect of their technical and formal correctness and in respect of the sufficiency of the sufficiency of the subject matter pleaded in them.

In this regard this case is to be distinguished from that of *Caperton* v. *Bowyer*, (14 Wallace, 216.) In that case the demurrer was sustained, and the Court said that the demurmur might be sustained on technical grounds, without involving the determination of the Federal Questions suggested by it; but here the demurrers were overruled, and the pleas held to be good in point of law. This could not be done unless the Court found both the form of the pleading, and the bar set up, good. The action of the State Court in the case in 14 *Wallace*, was negative; the action of the State Court in this case was affirmative. In that case it is evident the State Court might have decided as it did, without passing upon the Federal Question involved, because the pleas might have been bad in formal statement; in this case it is equally evident that it could not have rendered the decision it did without considering and determining the Federal Question presented, as well as the formal correctness of the pleas.

The record shows, in the language of Judge Story:

> By clear and necessary intendment, that the question must have been raised, and must have been decided in order to have induced the judgment.

That Question so presented was, as distinctly as elaborate pleading could make it, the Question, whether the statutes of Mississippi, and of the other States that combined with it to create the so-called Confederate States, were valid, as against the Constitution and Laws of the United States.

The State Courts held that these afforded a justification for acts, done under them, which were distinctly declared by

and necessary inference, that the question was made and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment.

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That Question so presented was, as distinctly as elaborate pleading could make it, the Question, whether the statutes of Mississippi, and of the other States that combined with it to create the so-called Confederate States, were valid, as against the Constitution and Laws of the United States.

The State Courts held that these afforded a justification for acts, done under them, which were distinctly declared by

the pleadings to the acts, in derogation of the authority and supremacy of the United States, and in contravention of its Constitution and the rights thereby secured to every citizen of peaceful occupation and possession of his own property.

The pleadings show that the only question submitted to the jury, was the question, whether the Defendant had committed these acts, "wantonly, maliciously, and willfully," or rightfully and patriotically, we suppose!

The commission of the acts was admitted, and the State Courts decided, by their overruling of the demurrers, that the Defendant was justified in doing them, by the fact of his execution of an order of a "Government" within the United States, and hostile to the United States.

It would seem that, if this act of his, otherwise a trespass, became a duty, by reason of his relations to the "Confederacy," it made little difference whether he acted "maliciously, wantonly, and wilfully," in its execution; and that the Courts below, in submitting to the jury his *animus* in obeying a lawful and binding order, really submitted to them a wholly immaterial issue.

Analysis of the Pleadings.

In discussing the erroneous views of law entertained by the State Courts, and resulting in their overruling the Demurrer to the Defendant's plea, we shall have to analyze at some length the pleadings.

There are two counts in the Declaration, differing only in that *one* of them alleges the trespass declared upon to be unjustifiable; and the *other*, that it was as well malicious, wanton, and willful.

The pleas we shall consider apply to both these counts.

The Fourth Plea.

What is called "Defendant's Fourth Plea" is found upon the 13th page of the Record. It sets up that before and at the time at which the alleged trespasses were committed, the people of the State of Mississippi, and of Texas, Arkan-

sas, &c., had been and were confederated together, and in revolt against the Government of the United States, and had within their territory subverted said Government and erected therein for the government thereof and its inhabitants, a new and separate Government, called the "Confederate States of America;" that a war had been and was being prosecuted between the United States and the Confederate States of America against each other, as belligerent nations; that the Confederate States, to maintain its government and to prosecute the war, had, at the time, in the State of Mississippi, an army, under the command of General Beauregard; and that the territory, property, and inhabitants of the State were thereby held in subjection and under the control and jurisdiction of the said Confederate States Government; and that General Beauregard had issued a general order, directed to officers under his command, to burn all cotton on the Mississippi River which was likely to fall into the hands of the enemy, to wit, the United States; that A. K. Farrar was acting as Provost Marshal, in the county of Adams, where this cotton was situated; and that, in obedience to General Beauregard's orders, Farrar was commanded to burn this cotton, and gave the order therefor to the defendant, who executed the same.

The Fifth Plea.

The Fifth plea of the Defendant is found on the 14th page of the Record. This plea admits the burning of the cotton, and asserts that the people of the State of Mississippi and of the States of Virginia, &c., had confederated together for revolt against, and, within their territorial limits, had subverted, the Government of the United States of America, and had erected a new and separate Government, called the Confederate States of America, composed and consisting of executive, legislative, and judicial departments; and that on the day when the alleged trespass was committed, war was prosecuted between the United States and the Confederate States as belligerent nations; and the said Confederate States had an army in the State of Mississippi, under com-

mand of General Beauregard, whereby the territory, property, and inhabitants of said State were held in subjection to, and under the control and jurisdiction of, said Confederate States; and that on the 6th day of March, 1862, by an act approved and promulgated on that day, the legislative power of the said Confederate States, to wit, the Congress of the Confederate States of America, had enacted that it should be the duty of all military commanders in the service of the Confederate States to destroy all cotton, tobacco, or other property that might be useful to the enemy, to wit, the forces of the said United States of America, when, in their judgment, the same should be about to fall into their hands; and that General Beauregard, being in command, &c., had directed Farrar, &c., to destroy this cotton, and that said Defendant was then ordered by the said Farrar to burn the said cotton of the Plaintiff; and that he, the said Defendant, in obedience to and in pursuance of said act of said Congress of the Confederate States, and the said orders of the said military commander and Provost-Marshal in the service thereof, did burn the said cotton of the said Defendant.

The Sixth Plea.

The Sixth Plea of the Defendant is found on the 16th page of the Record. This Plea recites that the people of Mississippi, and of Virginia, &c., had confederated together for a revolt against, and the subversion within their territorial limits, of the Government of the United States of America, and had subverted the said Government, and in place thereof had erected a separate and independent Government, called the Confederate States of America, having and exercising all the functions of a Civil Government within said territory and over its inhabitants; and that a war was being prosecuted between the United States and the Confederate States as belligerent nations; and said war was, on the part of the United States, for the invasion and conquest of the territory, arms, and people of the Confederate States, and on the part of the Confederate States for the defense of their territory, &c.; and that the said United

States, with their naval forces, were then invading the territory of the State of Mississippi; and that the cotton of the Plaintiff was about to fall, by capture, into the hands in said naval forces; that Defendant was an inhabitant and citizen of the said State of Mississippi, and subject to the power and jurisdiction, and living under the protection of, the Government of the said Confederate States, and that to prevent the capture of that cotton, he burnt it.

The Seventh Plea.

The Seventh Plea, found on the seventeenth page of the Record, recites that the people of the State of Mississippi and the States of Virginia, &c., had confederated together, and ordained and erected a separate and independent Government, called the Confederate States of America, having and exercising all the functions of a Civil Government; and that before and at the time of the alleged trespass a war had been waged and prosecuted by and between the persons exercising the powers of the Government of the said United States and those exercising the same powers of the said Confederate States, and against each other and the armies of each, as two belligerent powers and nations; and that the persons exercising the legislative power of the Government of the Confederate States had ordained, enacted, and established that it should be the duty of all military commanders in the service of the said Confederate States to destroy all cotton when it was about to fall into the hands of the enemy, to wit, the forces of the United States, and that General Beauregard, in command of the Confederate Army in Mississippi, ordered the cotton to be destroyed; and that Farrar, as Provost-Marshal, in the service of the Confederate States for the execution of the laws and orders of the said Confederate States, ordered and required the Defendant to burn the cotton.

The Order

referred to is given at length in the Second Plea to the First Count of the Declaration. It is as follows:

PROVOST-MARSHAL'S OFFICE,
NATCHEZ, *May* 2, 1862.

To the Citizens of Adams' County:

The following message has been received from General Beauregard:

To A. K. FARRAR, *Provost-Marshal.*

In conjunction with the Governor of Mississippi, you will forthwith burn all cotton likely to fall into the hands of the enemy, along the river and railroad.

[Signed] G. T. BEAUREGARD.

You are hereby directed to execute the above order, by burning, or otherwise destroying, all cotton likely to fall into the hands of the enemy on the banks of the Mississippi River, in the County of Adams, but so as not to endanger the destruction of buildings or other property.

James Surget and John Minor, you will proceed at once to execute the above order on the following plantations, viz: John Minor Carthage, Washington Ford's, estate of B. Wade, G. G. Gregory.

[Signed in Duplicate] A. K. FARRAR,
Provost-Marshal.

THE PRAYERS.

Technical strictness might, perhaps, exclude from consideration the prayers for instructions to the jury, (R. pp. 36–7,) as they are not embodied in a Bill, or Bills of Exception. But they were before the Court from which this case is brought here, being a part of the Record taken therefrom—the Circuit Court for Adams county, in which the case was tried.

So far as they present Federal Questions, they raise the points suggested by the pleas and demurrers, and they may be referred to as illustrating, both in respect of such Federal Questions, and the other matters involved in them the erroneous bent of the court.

The Third Prayer asks that the Act of the Confederate Congress of March 6, 1862, be construed to authorize the burning only of cotton which could not be removed out of the danger of falling into the hands of the "enemy."

The Fourth Prayer asks the Court to confine Farrar's authority to burn cotton, to the express authority conferred on him by the Act of the Confederate Government as a belligerent.

The Fifth Prayer seeks to have Farrar's authority, (if any be had,) to burn cotton limited to the burning of such cotton as was likely to fall into the hands of the enemy of the belligerent force under which he was acting.

The Sixth Prayer is for a construction of the Order to Minor and Surget, to the effect that they were to burn only such cotton as, in their judgment, was likely to fall into the hands of "the enemy."

The Seventh Prayer asks an instruction, that if the cotton in question was being removed to a place of safety, as Minor and Surget believed, they had no right to burn it.

The Eighth Prayer is for a ruling, that an order addressed to the joint discretion of two, cannot be executed by one alone of those two.

THE PLEAS SET UP:

1. That in burning the cotton the Defendant was executing an order received from Farrar, Provost Marshal of Adams County.

2. That Farrar, in turn, was executing an Order received from Gen. Beauregard, commanding the Confederate Army then in Mississippi.

3. That Beauregard gave this Order in the exercise of belligerent rights; and also as the Executor of an Act passed by the Confederate Congress.

4. That the Confederate Congress existed as the Legislative Branch of a separate and independent and belligerent Nation and Government, established by the people and States of Mississippi, Louisiana, &c., in the territory of the States named, in revolt from, and subversion of, the Government of the United States, which Nation, as to those territorial limits, had been subverted and overthrown.

5. That at the time of burning a war was being prosecuted between these two Governments, as between two separate belligerent nations, which war on the part of the United States was a war of conquest and invasion, and on the part of the "Confederates" was one of defense.

6. That inasmuch as the Defendant resided in the "Confederate States of America," it was his duty to obey the Acts of the Confederate Legislature, passed in aid of its purpose to overthrow the Government of the United States.

THE INVALIDITY

of these Defenses on Federal grounds is distinctly raised by the Demurrers, which were overruled.

The statement of the purposes of the late war on the part of the United States; of the *status* of the Confederate Government, and the rights, duties, and obligations flowing from it; and of the nature and extent of the belligerent rights extended to the "Confederate" forces, is at variance with the entire current of the Political and Judicial determinations of both State and Federal authorities, and cannot be sustained without violence to the well-settled Rules of Public Law.

POINTS.

I.

Conceding for the sake of argument that Beauregard could issue an Order which would authorize the destruction of private property, it is elementary that the terms of that Order must be strictly complied with, to create a justification, pleadable in law, for the commission of a trespass. The Order from Beauregard directed Farrar to act "*in conjunction with the Governor of Mississippi*," in the destruction of certain cotton. The Defendant claiming to act under this authority, sets up an order, not from these two, Farrar and Peters, but simply from Farrar.

By the terms of Beauregard's order, a certain discretion

was lodged in the Provost Marshal and the Governor. They were not to destroy *all* cotton over a certain area of country, but such as was "likely to fall into the hands of the enemy, along the river and railroad." Of course, it was for them to determine what cotton was "*likely*," &c. And it was not for *one* of them to determine, but for *both*.

Perry on Trusts, sec. 408.

It is true the pleas set up that the Plaintiff's cotton *was* liable to hostile capture. They do not set up, however, that the Governor of Mississippi, and the Provost Marshal, were of that opinion, and authorized the destruction.

So, too, the order produced from the Provost Marshal Farrar is an order to James Surget and John Minor—the former, the Defendant; the latter, not a party to the record.

II.

Conceding still, for argument's sake, that General Beauregard could authorize the destruction of cotton "likely to fall into the hands of the enemy," the facts of which this Court will take cognizance as a part of our national history, are, that there was no such imminence of capture as could be prevented only by destruction. There was ample time to remove the cotton beyond the danger of seizure.

The cotton was burned on the 5th of May, 1862, to keep it from seizure by the Naval forces of the United States, and the order for its destruction bears date May 2d, 1862.

Now, on that day, (the date of General Butler's Proclamation at New Orleans,) there was no Naval force of the United States nearer Adams county than New Orleans. The U. S. S. *Iroquois*, Commander James S. Palmer, was the first vessel to go up the Mississippi River.

It was not until the 12th of May, that she reached Natchez, the county seat of Adams county.

And there was ample time between the day the order of Farrar was issued, and the arrival of the naval forces to have removed the Plaintiff's cotton so far into the interior as to have secured it from "capture by the enemy, to wit, the said United States."

It is true that where

> Military agents exercise the right to impress [or destroy] private property, they exercise a discretion which unless shown to have been abused, cannot be revised by the civil courts. (Taylor *v.* Nash. & Ch. R. R. Co., 6 Coldwell 646.)

But they must be military agents of a lawful Government, acting in a lawful manner, and for a lawful purpose; and their discretion is respected because it is the exercise of the discretion of the agents of a sovereign power.

It would be stretching this rule unwarrantably to apply it to an insurgent committing a trespass, in aid of organized treason upon a citizen, whom, for aught that appears here, was then, and always, loyal to the Nation the insurgent was seeking to overthrow.

III.

Still conceding that General Beauregard could have made an Order authorizing the burning of cotton, it is clear that his Order is a justification only for a military man executing the Order of his superior.

It is not averred or hinted in the Record that the Defendant had any allegiance to the Confederate Forces as a Volunteer or a Conscript, or that there was any *vis major* compelling him to execute the order.

It is possible that a Confederate Soldier, executing the Order of his Commander, might, under some circumstances, be shielded from the personal consequences of his act by that allegiance.

Though this is denied, by high authority, when his act was against private rights as well as public duty.

> Hedges *v.* Price *et al.* 2 W. Va., 234.
> Caperton *v.* Martin, 4 W. Va., 138.
> Franklin *v.* Vannoy, 66 N. C., 145.

But the exemption does not go to citizens, not directly

connected with those forces, committing such acts of private wrong in aid of the Rebellion.

Cochran & Thompson *v.* Tucker, 3 Coldwell, 186.
White *v.* Hart, 13 Wallace, 646, p. 651.
Sprott *v.* United States, 20 Wallace. 459, p. 465.

IV.

It is sought by the Defendant to justify his trespass, upon the ground that he was obeying an act of the Confederate Congress.

It has been settled by a uniform and unvarying line of decisions in Federal and State Courts, that all Acts passed by the Confederate Congress, or the Confederate Legislatures, in aid of the Rebellion, are void, *ab initio*, utter nullities, not pleadable anywhere, as the source of any authority to do anything.

A mere reference to a few of the cases is all that need be given.

The West Virginia and Tennessee cases, *supra*.
The Sequestration Cases, 30 Tex., 688.
Reynolds, *Auditor*, *v.* Taylor, 43 Ala., 434.
Keppel's Adm'rs *v.* Petersburg R. R. Co., Chase's Decisions, pp. 209, 210.
United States *v.* Morrison, *Id.*, p. 525.
Evans *v.* City of Richmond, *Id.*, p. 554.
Texas *v.* White & Chiles, 7 Wall., 700.
Horn *v.* Lockhart, 17 Wall., 570.
Sprott *v.* United States, 20 Wall., 450.

V.

The Pleas aver the war between the United States and the Confederate Government, to have been one of conquest and invasion on the part of the former, and of defense on the part of the latter.

This is so manifest a mistatement of the facts that we need not waste time in refuting it by referring to the solemn announcement by the Political Department of our Govern-

ment of the purpose and object of the war, and the adoption of that determination by the Courts.

Whatever of direct or inferential support the Confederates, or this Defendant, get from this view of the war in the destruction of private property, may be a matter of speculation to the curious; it is not a subject for judicial ascertainment, nor can the Pleadings, that put it forward, be sustained by a Court.

VI.

The Defendant relies upon "Belligerent Rights," as his protection. We have already shown that the "Belligerent Rights" the "Confederate Forces" had, were confined to actual Belligerents, and that, granting Beauregard and Farrar, had, as Belligerents, the right to burn private property, this Defendant has not shown himself to be a Belligerent, or in any way controlled by Belligerents.

If he could have shown that connection or control, the Plea might have availed him.

And yet, inasmuch as the "Confederate Forces" derived such "Belligerent Rights" as they had, by gift, from their Sovereign, with whom they were at war, and not from the Confederacy, it follows that these "Belligerent Rights" extended no further than the precise, definite, and exact limits of the concessions made to them.

If the Confederacy had been a Sovereignty, there would have attached to all its subjects, in arms or out of arms, during the late war, all those immunities and privileges which, by the practice of nations, adhere to a nation at war; and it would have been proper to demand that a large latitude should be allowed to acts done in furtherance of the war. But the Confederacy was not a Sovereignty; it was not a Nation; it had no existence; it died in birth; it had no vitality to create authority; it had no entity to which responsibilities, or rights, or immunities could be adjoined; it was a mere ideality which the insurgents labored unsuccessfully to make real.

These insurgents, armed and unarmed, were recognized

by our nation as existing, and as citizens. Duties were exacted of them; disabilities were laid upon them. From the attack upon Sumter to the surrender of Johnston, the United States never relaxed its claim to their allegiance; never remitted its demand upon their obedience; never relinquished its sovereignty over them. The vast proportions of the Rebellion did not change its character, or the enormity of its crime.

From time to time, as motives of humanity or policy dictated, concessions were made, and favors granted them. Those captured in arms were not hung as traitors; prisoners were exchanged; military courtesies were interchanged; the "Acts" of popular representative bodies not in furtherance of Rebellion were accepted as the will of the people, and upheld as valid; and in local matters concerning the relations of man to man, designed to conserve social organization, they were left free from interference.

Latham *v.* Clark, 25 Ark., 574.
Thompson *v.* State, 31 Tex., 166.
Reynolds, *Auditor, v.* Taylor, 43 Ala., 420.
Shortridge & Co. *v.* Macon, Chase's Decisions, 136, p. 142.
Coppel *v.* Hall, 7 Wall., 542.
Huntington *v.* Texas, 16 Wall., 402.
United States *v.* Insurance Co., 22 Wall., 99.

But the measure of all these concessions was the will of the Sovereign. Nothing passed by inference. The Confederate forces had no larger or other Belligerent Rights than those expressly granted them; and hence it is incumbent on any one, claiming under alleged Belligerent Rights, to show that the precise Belligerent Rights set up had been granted.

Such averment is wanting in the Defendant's Pleas. Such rights, as he seeks to justify under, never were granted by the United States to the insurgents. We may search in vain the Proclamations, Orders, Statutes of the Nation during the late war, for any such concessions. The Courts

are concluded in this respect by the action of the political department. They cannot supplement, or extend, the grant.

It is instructive to notice the care this Court has taken in passing upon the "Belligerent Rights" of the insurgents to exclude any such enlargement of these "Rights," and to confine itself to the definition of what was actually given.

See, for instance, Coppel *v.* Hall, 7 Wall, p. 554.

Did the Defendant burn the Plaintiff's cotton in the exercise of any Belligerent Rights conceded to him by the United States?

Before this question can be answered in the affirmative, it will be necessary to show either (1;) a special authorization to him (which is not claimed,) or (2;) a general authorization to mere volunteers, non-combatants, to destroy private property when ordered to do so by an Insurgent Military Authority, to which they had no tie of military allegiance, and which exercised no duress over them.

We repeat, the Pleas contain no averment of such an authorization, and the Demurrer was therefore good.

Nor was there any such authorization. On the contrary, the Sovereign laid down an entirely different Rule.

General Order No. 100, Series 1863, from the War Department, contains "Instructions for the Government of the Armies of the United States in the Field," prepared by that eminent jurist, Dr. LIEBER, revised by a Board of Officers, of which General E. A. HITCHCOCK was President, and approved by President LINCOLN.

Paragraph 82 reads as follows:

> "Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers,—such men, or

> squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates."

Is not this the Defendant's case? Was he not in this trespass engaged in "committing a hostility without commission and without being part and portion of the organized hostile army?"

Here is the law for him. Had he been captured doing this by our forces he was to have been treated as a "highway robber or pirate"—without any protection of "Belligerent Rights" that would ensure his life. He was without any Belligerent Rights whatever.

True, the United States has not tried and punished him for Treason; but the Government that saw fit to grant him that grace has never said he should not be responsible to the private sufferer by his wrong-doing.

VII.

The Court below, in its Opinion, intimates that a proper policy discourages suits like this, and, impliedly, at least, sustains the inferior Court in overruling Demurrers upon this ground. But

> Courts have no policy, and can exercise no political powers. They can only declare the law.
>
> Shortridge & Co. *v.* Macon, Chase's Decisions, p. 140.

In Conclusion:

We have thus shown that all the grounds upon which the Defendant relied for justification are untenable.

He could not plead obedience to the Sovereignty of the "Confederate Congress" or the Legislature of the (Rebel) State of Mississippi, for these bodies had no claim upon him; indeed, he was, by the only political duty this Court can recognize as incumbent upon him, bound to disobey their every Act in aid of the Rebellion.

He could not plead Belligerent Rights, for he does not show that he was one of those Belligerents to whom certain Privileges were conceded, and such privileges as were conceded to the belligerent Insurgents do not cover his acts here sued upon.

He does not set up *Vis Major*, and so cannot claim Duress. And he does not so connect himself with the sources of the Authority he seeks shelter under as, by the Rules of Pleading, to entitle himself to its protection, if it had any to afford.

The Defendant, in violation of his duty to his Country, committed a trespass which had at once a public aspect and a private bearing. The Sovereign against whom it was aimed has not seen fit to punish him for his treason; but that Sovereign has not relieved him of his personal responsibility to his fellow-citizen.

In the language of Chief Justice Chase—

> Those who engage in rebellion must consider the consequences. If they succeed, rebellion becomes revolution, and the new government will justify its founders. If they fail, all their acts hostile to the rightful government are violations of law, and originate no rights which can be recognized by the Courts of the Nation whose authority and existence have been alike assailed.
>
> Shortridge & Co. *v.* Macon, Chase's Decisions, p. 144.

Similar to this is the language of the Court in the West Virginia case of *Hedges* v. *Price et al.*, above referred to.

> When the rebellion is suppressed, the sovereign and his injured subjects have no chance of redress or indemnity as from a hostile State. In the eye of the law, the success of the sovereign establishes, beyond controversy in all his courts, the criminality of the rebellion, whatever *salvo* the rebels may choose to lay to their consciences.
>
> And if there was no personal responsibility, then there would be a wrong without a remedy, a govern-

ment without protection to its people, but rather a screen to its enemies. It would be to give immunity to crime and every species of robbery, encouragement to traitors, and punishment to patriotism. The reason and necessity, therefore, which require immunity in the one case, not only do not require it in the other, but absolutely forbid it. And since such a rule would violate the principles on which all rightful authority in government is maintained and justice enforced, it would seem to require an express ratification by all nations of the earth to make it obligatory as a part of the *jus gentium*.

With these expressions of Federal and State Courts concurs the opinion of this Court in the case of *Sprott* v. *United States*, above cited. (See p. 465.)

So far as the actual exercise of its (the Confederate Government's) physical force was brought to bear upon individuals, that may, under some circumstances, constitute a justification, or excuse, for acts otherwise indefensible, but no validity can be given in the Courts of this country to acts, voluntarily performed in direct aid and support of its unlawful purpose.

Respectfully submitted,

B. F. Butler,

R. D. Mussey,

Of Counsel.

APPENDIX A.

Opinion of the Supreme Court of the State of Mississippi.
(46 Miss., 130.)

The pleas in bar set up, in substance, that the people and State of Mississippi, in combination and confederation with Louisiana, Alabama, Georgia, and other States, known as the Confederate States, were waging war against the United States; that, by an act of the Congress of the Confederate States, cotton, liable to fall into the hands of the hostile belligerents was by military to be destroyed; that General G. T. Beauregard was the commander of the army, having possession and control of the State of Mississippi; that he, as such commander, directed an order to A. K. Farrar, provost-marshal of Adams county, to burn the cotton on the Mississippi river and the railroad; that said Farrar commanded the defendant and one Minor to execute it, by burning cotton on certain specified plantations on the Mississippi river; and that, by authority thereof, defendant did destroy the plaintiff's cotton. The question, not free of difficulty, is, whether these facts excuse or justify the act complained of as a trespass. That again requires an inquiry into, and an ascertainment of, the status of the respective belligerents towards each other during the war.

We propose this inquiry, simply and purely, as a legal problem, to be deduced from the principles announced by the Supreme Court of the United States, the final arbiter of such questions. It may not be easy to aver principles from the publicists to be, in all circumstances, safely applied to the late war. It were a safer process of reasoning to look to the leading historical facts, as exerting a controlling influence over legal questions arising out of them. Such was the course of the Supreme Court in the Prize Cases. (2 Black, 673.) It will be remembered that the President, in the recess of Congress, April, 1861, issued his proclamation declaring a blockade of certain ports. Captures were made on the high seas, and the question was, whether the vessels could be condemned as prizes of war. It was conceded by the court that the President could not declare or initiate a

war against a State or States; but he was charged by the acts of 1795 and 1807 with the duty of using military means to suppress an insurrection or repel an invasion. Capture and condemnation as prize are belligerent rights, and are only lawful in war.

The court concluded that the insurrection at once culminated in civil war; referring to the facts "that it was not a loose, unorganized insurrection, having no defined boundary or possession. It acted as States claiming sovereign power over persons and property within their limits, several of which States had combined to form a new confederacy. South of its military lines, it is enemy's territory, held in possession by an organized military power. All persons residing within this territory, whose property may be used to increase the revenues of the hostile power, are in this contest liable to be treated as enemies." From such premises, the court determined that the blockade was a rightful measure, to aid in overcoming the insurrection, and was conclusive that "a state of war existed."

A civil war is never preceded by a declaration; it becomes such by its accidents, the number, power, and organization of those who engage in it. The declaration of independence, the organization of great armies, the commencement of hostilities, induced some of the powers in May, 1861, to recognize the insurgents as belligerents, and gave to the conflict the character of "war." The court in the same case quote, approvingly, the language of Vattel, laying down the rules which apply in civil wars: "The nation is divided into two independent parties, who consider each other as enemies and acknowledge no common judge. Having no common superior to judge between them, they stand in precisely the predicament of two nations who engage in a contest and have recourse to arms." In 2 Wall., 419, it is repeated that the war was governed by the principles of public law, as alike applicable to civil and international wars, and that all the people inhabiting the insurrectionary States must be regarded as enemies, and their property as enemies' property.

The President, by the act of 13th July, 1861, was directed to issue his proclamation, declaring what States and parts of States were in insurrection, and thereupon intercourse and commerce was forbidden with such Territory, and thereupon it was impressed with the status of hostile Territory until the national authority was re-established. The executive proclamation was so issued the seventeenth of Au-

gust of the same year, so that the late domestic war had two distinguishing features: 1st. From its careful and orderly organization the magnitude of its preparation, and the strength of its resources, it at once assumed the proportions of "war." 2d. It had a Territory of defined boundaries, within which, for a time, it exerted supreme authority. In the means adopted by the United States for its suppression, these were accepted facts, and the measures were suited to the exigencies. The inhabitants and their property, whether of citizens or foreigners, were, for many purposes, (pending the conflict,) tainted as hostile. As in foreign war, blockades were instituted, captures made on the high seas and condemned as prizes of war. It was no defense in the prize court to allege that the vessel or its cargo was the property of a foreigner or a citizen of friendly or loyal sentiments toward the United States; if the cargo was the product of the hostile Territory, it was lawful prize. If the vessel was trading with it, that condemned it.

Ordinarily, in the practice of modern times, movable property is not treated as spoils of war, except that an invading army may levy contributions, or take without compensation, food for its subsistence, and animals for military purposes.

In the late war, both belligerents regarded cotton as a commodity of special and peculiar importance, not in the sense of its intrinsic value, or its worth as an article of commerce simply. It was looked to by the Confederates as the chief source of credit, and the means by which arms and munitions of war were to be procured. It was regarded also as an element of power to influence favorably the western nations of Europe, so largely engaged in its manufacture, and dependent greatly on this country for supply.

It is well known that the Confederate Government was a very large owner of cotton, bought for the purpose of being used to procure military supplies and munitions. The exclusion of American cotton from the consumption of the world had advanced its price in the manufacturing States and in Europe to very high rates. It became the policy of the Confederate belligerent to prevent cotton falling into the possession of the United States. Therefore, it was ordered, by law of the Confederate Congress, that, when so exposed, it should be destroyed. Thus cotton became *quasi* contraband of war, indirectly to one of the belligerents, a cheap munition and source of supply; to the other, a

strengthening of resources and a weakening of the adversary.

Hence, in Mrs. Alexander's case, (2 Wall., 418,) while accepting the general rule to be that "private property (under the modern usages of war) is not subject to seizure for the sake of gain," and ought to be "restricted to special cases, dictated by the necessary operations of the war," yet cotton formed an exception to the general rule, on account of the peculiar character of the property, because "the rebels regarded it as one of their main sinews of war," and their Government, rather than permit it to fall into the possession of the national troops, has everywhere devoted it to destruction, however owned. It was liable to destruction rather than that it should remain an element of strength to the rebellion. The capture of Mrs. Alexander's cotton, and its condemnation, was justified, both on the grounds of public policy and under the act of Congress of August 6, 1861, making all property employed in aid of the rebellion, with consent of the owners, to be a lawful subject of capture and prize wherever found.

It was because of the special value attached to this property, as a means of prolonging the conflict, that the United States considered it, on motives of policy, subject to seizure and appropriation, and the Confederate belligerent, in order to prevent a "main sinew" of the war from falling into the possession of the United States forces, devoted it to the flames. It follows, therefore, that it was a lawful belligerent act, in certain circumstances, to destroy cotton. To relieve the party engaged in it from civil responsibility to the owner, he must be in such relation to the Confederate belligerent as to give the act the character of belligerency and hostility; his conduct must be guided and prompted by military authority.

No rights of sovereignty pertained to the Confederate States.

As to the United States, the Confederate States was an usurpation; it was not a *de facto* government; its legislation was a nullity, having no effect or validity in law.

Thorington *v.* Smith, 8 Wall., 9, 10, 11, 12.
United States *v.* Kuhler, 9 Id., 86.

Therefore, in the last of these cases, it was held that a postmaster of the United States was not justified in paying money over to the Confederate Government or its officers, because a law of the Confederate Congress so required. The

law itself was no justification. The act could only be excused when accomplished by a "*vis major*."

It is averred in the pleas that, at the time the plaintiff's cotton was burned, the county of Adams was in possession of and subject to the insurgent authority, capable of enforcing obedience, and constraining the conduct of the inhabitants. It was represented by the military power. A. K. Farrar was provost-marshal, under General Beauregard, as his superior. The order came from the general to the provost-marshal, and through him to defendant and one Minor. The pleas negative the idea that the burning was voluntary, wanton, or malicious. It is inferable, inasmuch as the command was given to the defendant, that he was amenable to the authority of the provost-marshal. It was a military command, originating with the highest authority in that district. While those engaged in waging war against the United States might, after the war was over, be held to account by the sovereign for a breach of their allegiance; yet, while it lasted, for all hostile acts done, they could rightfully appeal to the privileges and immunities of the public law, as members of a belligerent power. The destruction of certain sorts of private property, such as provisions, beasts of burden, or their removal beyond the reach of the enemy, ought to be referred to and adjudged of by the exigencies of war. It is a legitimate belligerent right to destroy whatever private property is the subject of seizure and condemnation, in order to prevent it coming into the use of the enemy. It would hardly be claimed that the Confederate general who ordered the destruction of thousands of bales of cotton (whatever may be thought of the wisdom of his conduct) on the evacuation of New Orleans, could be held to account to the owners as a trespasser. His plea would be that he did it to prevent the property inuring to the captors as spoils of war.

An order by the military power, in the control of the country, with means to compel obedience, directed to and executed by the persons named, (as in this case to burn cotton,) is a belligerent act, as much so (according to the policy of both belligerents,) as the strategic movements of an army or a battle. The legislation of the Confederate congress, or of the State, affords no protection as imparting legality to the act. The Confederate government, in judicial questions like this, can receive no other consideration than as the organized head of the insurgent powers, part of the combination by arms to overthrow the National Gov-

ernment and Union. The only import of such legislation is to supply evidence that the insurgent belligerents regarded cotton as its chief resource to supply the means of war, and therefore, justified the policy of the United States to treat it as *quasi* contraband of war, and subject to seizure.

But who is judge of the propriety of General Beauregard's order through the provost-marshal? There was no tribunal competent to stay it, or adjudge of its fitness and validity. Farrar as a subordinate, had no discretion. He was shut up to obey. Those to whom he intrusted its execution bore toward him the same relation that he did to his superior. In the view, which we have taken of the subject, we think the defense is complete when it is ascertained that the burning of the cotton was a hostile, belligerent act, in obedience to military order. The fact that the order was given to Surget and Minor, necessarily implies that they were subject to obey. It was said by the chief justice, in Texas *v.* White, 7 Wall; that while belligerent rights were conceded, the United States studiously avoided any other recognition of the Confederate States than as a part, as the organ of the military power. Whatever might be rightfully done in a foreign war by a belligerent in the prosecution of hostilities could be done by the Confederates. *Mauran* v. *Insurance Co.*, 6 *Wall*, 10, 11, 12, 13; *Hanger* v. *Abbott*, Id., 335, 336, 337. The principle, having this extent of application, has been repeatedly stated by the Supreme Court of the United States; but while this concession is made, it has as often been declared that the sovereign because of it, foregoes none of his rights to deal with his citizens for taking arms against him. All that we mean to affirm is, that acts considered legitimate in the prosecution of hostilities do not render the doers of them amenable to make reparation, in damages, to private persons who have been injured in their property. If horses had been taken from non-combatants (by impressment) for military service, it would hardly be maintained that those who did it would be liable personally to the owners, nor would the courts give a remedy to restore these animals to their former owners, if, at the close of the war, they were found in the possession of citizens who derived a right, through the military, as by a quartermaster's sale of condemned property.

The circumstance that the provost-marshal published the order to the people of Adams county, indicates that they were in sympathy with its motive and purpose, and that no

serious difficulties would be encountered in carrying it out; nor can it be doubted that, if he had not the means at hand to overcome opposition and resistance, that ample force would have been promptly supplied.

Necessarily, there were many excesses of authority, abuses of power, and wrongs done during the late war. In this, the greatest struggle of arms of modern times, employing the utmost energy and resources of the people; when nearly all of them, in one form or another, were participating in the struggle; when the courts, for the most part, were closed, and the laws in the midst of arms were silent, or, if they spoke at all, uttered but a feeble voice, it is not to be expected that, in all circumstances, personal rights and private property would be scrupulously respected, or that those who acted under military orders were at all times discreet and forbearing.

We do not think that it would be wise to encourage the exhuming of such transactions of those distempered times for adjudications in the courts.

Any other doctrine than that we have announced, as the result of mature reflection, would flood the courts with suits for compensation for property taken or destroyed during the war. That so few have been brought is persuasive that the conclusion of law we have reached has been sanctioned by the judgment and conscience of the community. It commends itself to the reason, and is promotive of quietude and charity one toward another.

We have examined the cases referred to by counsel at the argument reported in 2d and 4th West Virginia Reports. With deference and respect for that learned court, we are constrained to the belief that the court failed to apprehend and apply the correct principle of law to the facts before it.

We have looked to the pleas solely with reference to their substance, and not to their structure and technical sufficiency, so that they were treated by counsel at argument.

Let the judgment be affirmed.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

No. 5.

Washington Ford, Plaintiff in Error,

Vs.

James Surget, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Judd & Detweiler, Printers

Supreme Court of the United States.

OCTOBER TERM, 1877.

No. 5.

WASHINGTON FORD, PLAINTIFF IN ERROR,

vs.

JAMES SURGET, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

JURISDICTION.

Was a Federal Question raised in the Court below?

This cause is brought before this court for review, because it is supposed that the 25th section of the judiciary act of 1789, gives this court jurisdiction. That section provides:

"That a final judgment or decree, in any suit in the highest court of law or equity of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States; and the question is in favor of their validity; or where is drawn in question the construction of any clause of the Constitution or of a treaty, or statute of, or commission held under the United States, and the decision is against the right, title, privilege,

or exemption, specially set up or claimed by either party under such clause of the said Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, &c. * * * But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute."

1 U. S. Stat. at Large, 85, 86, 87.

It is assumed by counsel for appellant that a Federal question was raised and decided in this cause, as if the Constitution and laws of the United States were in full force and vigor while the war continued, over the territory occupied and held by an adverse belligerent government. This is a begging of the whole question. The special pleas are based upon the idea that the Constitution and laws of the United States had so far ceased to be operative within that territory, as that acts of war by the belligerent rebels were to be judged of and determined by the laws of war.

The Constitution and laws of the United States were not framed or intended to meet a case in which a war should exist having a part of the States making war against the others. If this be not true, upon what can we base the action of the Federal Government during the war or find authority for the decisions of this Court?

Mrs. Alexander's Case, 2 Wall., 402.
The Prize Cases, 2 Black., 687.
Thornington *vs.* Smith, 8 Wall., 1–3.

Looking into this petition for a writ of error it appears that Ford bases his right to a hearing in this Court upon the second clause of the 25th section of the Judiciary Act, *i. e.*, "that there was drawn in question the validity of a statute of, or an authority exercised under the said State of

Mississippi," and "that the said supreme court of Mississippi could not have given said judgment without deciding upon the validity of the said statute of, or authority exercised under the State of Mississippi, on the ground of their being repugnant to the Constitution or laws of the United States." (Record, p. 1.)

What "statute" or "authority exercised under the said State of Mississippi" is set up in the special pleas or anywhere appears to have been passed upon from the face of the record? The pleas are in no wise, on their face, dependent upon any such "statute" or "authority." They go upon the ground that in war obedience to the supreme military and civil power of the *locus in quo*, in the doing of a military act, furnishes no ground for a civil action for damages, and that the resident of belligerent territory may, without incurring pecuniary liability, commit acts of defensive war, such as destroying bridges to impede the enemy—or food or property which an advancing enemy might benefit by. Defendant, as shown by the record, never set up as a defense any "statute of, or authority" from the State of Mississippi.

Was a Federal Question passed upon by the Court below?

There is no certificate of the chief justice of that State on the jurisdictional subject but an allowance of a writ of error only.

There is no bill of exceptions, and we submit that if the judgment of the court below could have been given irrespective of anything set up in the special pleas, this Court will not exercise jurisdiction, because the record must show that the jurisdictional "question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment."

Crowell *vs.* Randall, 10 Peters, 392.

It must appear from the record that the question was necessarily involved in the decisions, and that the State court could not have given the judgment or decree which they passed without deciding it.

Murdock *vs.* City of Memphis, 20 Wall., 591, 634, 635, 636.

Bridge Proprietors *vs.* Hoboken Co., 1 Wall., 143.

Armstrong *vs.* Treasurer of Athens County, 16 Peters, 281.

Railroad Co. *vs.* Maryland, 20 Wall., 643.

If the judgment of the State court (the supreme court) might have proceeded upon some ground of general law, independently of the Federal question, a writ of error will not lie.

Klinger *vs.* Missouri, 13 Wall., 257.

Com'l Bank *vs.* Rochester, 15 Ibid., 639.

Rector *vs.* Ashly, 6 Ibid., 142.

Gibson *vs.* Choteau, 8 Ibid., 317.

Chief Justice Waite, in a recent decision, denied the jurisdiction of this Court in a case wherein it was contended that a Federal question was raised, because the general laws of war, as recognized by the laws of nations applicable to that case, were, in some manner, modified or suspended by the Constitution laws, treaties, or Executive Proclamations of the United States.

New York Life Insurance Co. *vs.* Hendren, 2 Otto, 286.

And in the case of Brown *vs.* Atwell, 2 Otto, 329, the Chief Justice says:

"We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts, for the record to show that a Federal question was argued or pre-

sented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

And cites previous decisions.

There is in the assignment of errors no reference made to a Federal question. The Supreme Court will not, under the rules, notice errors not assigned.

To give this Court jurisdiction the supreme court of Mississippi must have passed upon and decided the Federal question set out in the petition for the writ. It is not sufficient that the inferior court did so. Still, contending that there was no proper Federal question involved in the case, it does not appear from the record (and this cannot be eked out by a copy of the opinion of Chief Justice Simrall) that the supreme court of Mississippi did decide that question. The judgment of that court is on page 42 of the printed record. It is a general judgment of affirmance, and if that judgment could have been properly rendered, irrespective of the questions raised by the special pleas, then this Court will not presume that the Federal question was passed upon.

"The assignment of errors or the published opinion of the court" (*i. e.*, the State court) "cannot be received for that purpose. They make no part of the record proper, to which alone we can resort to ascertain the subject-matter of the litigation."

Medbury *et al. vs.* State of Ohio, 24 How., 413.
Ingle *vs.* Coolidge, 2 Wheat., 363.

And so is the rule as to papers certified by the clerk, but not embraced in the pleadings.

Lessor of Fisher *vs.* Cockrell, 5 Peters, 248.
Lessee of Reed *vs.* Marsh, 13 Ibid., 153.

No Bill of Exceptons.

Appellant, by a motion for new trial, could have embodied (if he had been refused one) all the testimony in a bill of exceptions, and have shown that the judgment could not have been rendered without passing upon the Federal question.

The Rev. Code Miss., 1857, page 505, provides that—

"When a motion for a new trial shall be granted or refused, either party may except to the decision of the court, and may reduce to writing the reasons offered for said new trial, together with the substance of the evidence in the case, and also the decision of the court on said motion; and it shall be the duty of the judge, before whom such motion is made, to allow and sign the same; and such bill of exceptions shall be part of the record in the cause. And it shall be lawful for the appellant or plaintiff in error in such cause to assign for error that the judge, in the court below, improperly granted or refused a new trial therein. And the high court of errors and appeals shall have power to grant new trials, or to correct any errors of the circuit court in granting or refusing the same."

The presumption is in favor of the correctness of the judgment below, and will be affirmed if the record does not show error.

Lee *vs.* Bennett, 2 George, 119.
Cason *vs.* Cason, 2 George, 578.

This presumption exists "if, under any circumstances," the judgment could have been proper, there being no sufficient bill of exceptions to disclose all the facts of the trial.

Duncan *vs.* McNeill, 2 George, 704.

In these bills of exception, *all* the testimony must be

embodied, or its substance, that the court may be advised as to the whole case.

Phillips *vs.* Lane, 4 How., (Miss.,) 122.
Terry *vs.* Robbins, 5 S. & M., 291.
Wright *vs.* Bank of Alabama, 6 S. & M., 251.
Phipps *vs.* Martin, 33 Miss., 211.

We conclude, therefore, that this Court will look into the judgment itself and at the record, and if the supreme court below could have arrived at that judgment without deciding the Federal question, will not entertain jurisdiction.

PLEADINGS.

The attention of the Court is called to the fact that the general issue was plead to each count of the declaration, and a *similiter* added. There was no bill of exceptions. This is not a case in admiralty or equity, and therefore depositions or other papers copied into the record are there erroneously. The presumption is always in favor of the correctness of the judgment of the lower court, and unless the record itself brought up discloses error, there should be an affirmance of the judgment. By the statutes of Mississippi, the plaintiff below could have excepted to the testimony as presented, or moved for a new trial; and if this had been refused, it was his right to embody *all* the testimony in a bill of exceptions, and this Court, and the supreme court of Mississippi, might then have learned upon what the verdict and judgment were based. For aught that this Court can know, and we have a right to take the case most strongly against appellant, he failed to prove the ownership of any cotton, or that it had any value, or that Surget burned it. The pleas of the general issue did put plaintiff to the necessity of proving these facts,

and, failing to make proof, the case could well have gone for defendant without his being put to proof of the matters of his special pleas, and the verdict and judgment have rested upon other and different grounds than those relied upon in those pleas.

If there are good pleas, and those that are defective in a cause, and a verdict and judgment be rendered in favor of defendant, it will be presumed that the jury based the verdict upon evidence sustaining the good pleas, and the court gave judgment accordingly. Unless a bill of exceptions shows the fact to be different, and that plaintiff was, on the trial, damnified by the false pleading, the judgment should be affirmed. No authorities, it is believed, need be cited on this point.

This is the rule in criminal causes, where more strictness is required than in civil causes, and probably there has been no well-considered criminal case decided differently, if the reversal of the judgment against Daniel O'Connell by the House of Lords in England be excepted. In that case the decision may well be attributed to political considerations. The legal profession certainly was startled by its novelty, and the disregard of the established rule in such cases.

It is contended, however, in behalf of defendant, that the special pleas in the cause are good and sufficient, and present a legal defence.

Sufficient time has elapsed since the suppression of the rebellion, as it is commonly called, to enable us to consider, dispassionately, the legal questions growing out of it.

If, here in argument, formal objections are raised, which was not done below, in regard to the pleas, it is only necessary to copy the Mississippi statute to show that they are sufficient in law. That Legislature, endeavoring to dispense with technicalities, enacted the following:

"The declaration shall contain a statement of the facts constituting the cause of action in ordinary and concise language, without repetition, and if it contain sufficient

matter of substance to proceed upon the merits of the cause, it shall be sufficient."

Miss. Rev. Code, 1857, 492.

And "that all the provisions before contained in reference to the form and sufficiency of the declaration shall extend and apply to the pleas of a defendant, and to all subsequent pleadings in the cause, so far as the same may be applicable." And "that the general issue," and "justification, in libel, slander, and other actions" * * * "may be pleaded together as of course."

Ibid., 493.

SUBJECT MATTER OF LITIGATION.

The article alleged to have been destroyed, was cotton. During the war it was the subject of special legislation by each belligerent power. It was treated by each army, navy, and Government, not as other property, but as possessing extraordinary qualities, and to be treated, even in the hands of non-combatants, as different from ordinary private property. It formed the basis of the credit which the Confederate Government was laboring to establish in Europe for the prosecution of the war. Its retention in the Southern States, and withdrawal from market, except when used by the Confederate Government for war purposes, was considered by that Government as of vital importance, for it was hoped that its withdrawal from foreign market would hasten a recognition of the independence of the States in rebellion, and a raising of the blockade, which was destroying the resources of the Confederates and crippling their armies. Its destruction or retention in the South was operating injuriously to the Northern States by cutting off the supplies for their manufactories, and thus weakening their resources. The Congress of the Confederate States, prior to the burning complained of, had, as a *war measure, a belligerent act*, directed that cotton, sugar and tobacco, liable to fall into the

hands of Federal forces, should be destroyed; and, it is a matter of history that millions of dollars worth of these articles were accordingly destroyed.

The regulations established by the Federal Government, the acts of its officers—military, naval and civil—and the decisions of this Court, show what importance that Government, during the war, attached to cotton, and how it would be disposed of if found in the hands of a resident of a State in rebellion.

The Chief Justice, in the Alexander Cotton Case, 2 Wall., 419, treating of the rule which, in general, does, or rather ought to, exempt private property in war from seizure, except for war purposes, says: "It may now be regarded as substantially restricted, in special cases dictated by the necessary operation of the war," and as excluding, in general, "the seizure of the private property of pacific persons for the sake of gain;" and cites, 1 Kent, 92, 93. While recognizing this humane rule, the Chief Justice, in the case referred to, in which cotton was the subject of litigation, says:

"The capture seems to have been justified by the peculiar character of the property, and by legislation. It is well known that cotton has constituted the main reliance of the rebels for means to purchase the munitions of war in Europe. It is a matter of history, that, rather than permit it to come into possession of the national troops, the rebel government has everywhere devoted it, however owned, to destruction."

2 Wall., 420.

Indeed, cotton was treated rather as contraband of war, as having lost its character as private property merely, and become the subject of special governmental control and action, whether for preservation, seizure, confiscation, or destruction.

Belligerent Rights.

The matter in issue in this cause, raised by the special pleas, will be better understood by examining, aided by a reference to well-settled principles of international law, and the decisions of this Court, into the *status* of the parties at the time of the alleged trespass, and the true character of the insurrectionary government when it issued the order set up in defense.

A war was then in progress between certain States styling themselves "the Confederate States" and the General Government. Foreign States and the United States Government had recognized the people in rebellion as "belligerents," in the legal sense of the term. A blockade had him established and public notice given of it; exchanges of prisoners made, large armies were in the field contending with varied success. The State of Mississippi had undertaken to sever her connection with the Northern States of the Union, and her territory was held and occupied by rebel armies. A rebel government was in full vigor with all the appropriate forms, officers and characteristics of a government claiming to be free and independent. Ford and Surget then were residents of Mississippi, part of the territory held and claimed by the Confederate Government. They were alike held by a well-known rule of international law to owe allegiance and service, civil and military, to the power or government holding, as it had done by strong arm, the territory in which they resided. Its orders they could not legally or safely evade or disobey, and, no matter what their opinions might have been as to the origin or the character of the new government, they were enemies of the General Government. So this Court has decided they were in the Alexander Cotton Case. The chief justice, in delivering the opinion of the court in that case, declares:

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"We must be governed by the principles of public law so often announced from this bench, as applicable alike to

civil and international wars, that all people of each State or district in insurrection against the United States must be regarded as enemies until by action of the Legislature, and the executive or otherwise, the relation is thoroughly and permanently changed."

2 Wall., 419.

Further on, in the same opinion at page 488, in speaking of Mrs. Alexander's cotton, and her attempts to prove loyalty—she being a resident of Louisiana—a State in rebellion, it is announced:

"There can be no doubt, we think, that it was enemy's property. The military occupation by the national military forces was too limited, too imperfect, too brief, and too precarious, to change the enemy relation created for the country and its inhabitants by three years of continuous rebellion, interrupted at last for a few weeks, but immediately renewed and ever since maintained."

This Court, in the "Prize Cases," in December, 1862, in deciding upon captures of private vessels taken in 1861 from the residents of Confederate territory, says:

"Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents, the number, power, and organization of the persons who originate it and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest is war."

2 Black, 666, 667.

In the same cases, after referring to the recognition of the "belligerent" character of the people in rebellion by Great Britain, the Court further say:

"After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the government and paralyze its power by subtle definitions and ingenious sophisms."

2 Black, 669, 670.

In the same cases, (pages 673, 674,) the Court say of the Rebellion:

"It is no loose unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force. South of this line is enemies' territory, because it is claimed and held in possession by an organized hostile belligerent power."

In a subsequent case, the Chief Justice of this Court declares a government "*de facto*" to exist, "where the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country." And again, "its distinguishing characteristics are, first, that its existence is maintained by actual military power within the territories against the rightful authority of an established and lawful government; and, second, that while it exists, it must necessarily be obeyed in civil" (why civil only?) "matters by private citizens, who, by acts of obedience, rendered in submission to such force, do not become responsible as wrong-doers for their acts, though not warranted by the laws of the rightful government."

7 Wall., 554; citing the Castine Case, (4 Wheat., 253,) and the Tampico Case, (9 How., 614.)

In speaking of the Confederate Government, in Thorington *vs.* Smith, the Chief Justice holds that "the whole ter-

ritory governed by it was thereafter (*i. e.*, after the war began) held to be enemy's territory, and the inhabitants of that territory were held, in most respects, as enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned; that supremacy would not justify acts of hostility to the United States. How far it should excuse them, must be left to the lawful government upon the re-establishment of its authority."

The learned judge, evidently, when speaking of "acts of hostility to the United States," is referring to accountability to the lawful government itself, when re-established, and is not laying down a rule as to the responsibility of one insurgent to another for acts done in furtherance of the insurrection, or by orders of the usurping government.

The Law of Nations Applied.

Then, at the time of the alleged burning of Ford's cotton, a war was in progress, and he and Surget were alike to be regarded and treated as subjects of the Confederate Government, alike in rebellion, and in its causes alike having risked person and property, (from the authorities cited a war clearly existed,) and it follows that except as to questions between the United States Government and those in rebellion, the people of the insurrectionary States must be held as between themselves, and between the Confederate Government and themselves, to have been in person and property under the control and authority of the insurrectionary government.

That government had for the time absolute control over them with the power and right by the law of nations to enforce obedience.

But "every man is in judgment of law a party to the acts of his own governments and a war between the government,

of two nations is a war between all the individuals of the one and all the individuals of which the other nation is composed."

1 Kent, 63.

"Although a State of war puts all the subjects of the one nation in a state of hostility with those of the other, yet by the customary law of Europe every individual is not allowed to fall upon the enemy. If subjects confine themselves to simple defense they are to be considered as acting under the presumed orders of the State." "But they cannot engage in offensive hostilities."

1 Kent's Com., 94, 96–102.

As to the destruction of the cotton, Ford was a party to "the acts of his own government." He cannot question them now. If the rebellion had been successful he might have claimed compensation from his government, but not from Surget, acting under orders of the common government.

Ford and Surget and thousands besides, engage in a rebellion—form and recognise an insurrectionary government—the whole scheme fails, and Ford asks that Surget be compelled to pay him for losses sustained in the joint attempt. Will a court now aid him in such an unreasonable and unjust attempt?

See Vattel, (Ed. of 1855,) 402, § 232.

The act of Surget was one of *defensive* war. Vattel declares that "on all occasions susceptible of doubt, the whole nation, the individuals and especially the military, are to submit their judgment to them who hold the reins of government, to the sovereign; this they are bound to do by essential principles of political society and of government. What would be the consequence if at every step of the sovereign the subjects were at liberty to weigh the justice of his reasons, and refuse to march to war which might to them appear unjust? It often happens that prudence will

not permit a sovereign to disclose all his reasons. It is the duty of subjects to suppose them just and wise until clear and absolute evidence tells them the contrary. When, therefore, under the impression of such an idea, they have lent their assistance in a war which is afterwards found to be unjust, the sovereign alone is guilty; he alone is bound to repair the injuries; the subjects, and particuarly the military, are innocent, they have acted from a neccessity of obedience."

Vattel, (p. 380, § 187.)

As to Ford and Surget, who, in 1862, was the sovereign as between themselves and the rebel government? The people of the insurrectionary States, of whom these parties were units.

Civilian or Soldier?

But it is argued in behalf of appellant that to constitute a good defence under the special plea, Surget must have been a soldier and acting under orders and subjected to the *viz major*. This court in the Alexander Cotton Case, decides the principle that Surget being voluntarily within the territory held by arms in the interest of the rebellion, would be held by the United States Government as an enemy regardless of his opinions or wishes, and as subject to the Confederate Government.

By what process is it that a civilian is turned into a soldier? Does international law prescribe a set form or ceremony? This can be done by any belligerent power in its own way. Certainly when obedience to a government is due from a subject nothing more is needed than putting the civilian by orders to perform military acts. This is just what the pleas allege was done as to Surget. A subject will not when performing acts not forbidden by the laws of war, be held to be making war on his own account, when he does a military act by order of his government. The rules on this subject adopted by civilized nations, are designed to

keep down private war, and at the same time, in the interest of humanity, to protect from harm one who is forced by his government to acts of hostility against the enemy of that government.

Act of Confederate Congress a War Measure.

It is not required that any reply should be made to so much of the argument of appellant's counsel as relates to the act of Congress referred to in the pleas, so far as that argument holds this to be a civil, as distinguished from a military or belligerent act. We insist that the act of the Confederate Congress was a belligerent act—an order to destroy certain property in cases where it was in danger of aiding the National Government in the prosecution of the war. The United States Government recognized the Confederacy as a fighting power, and accorded to it belligerent rights. The pleas recite the act of Congress as inducement, and then the order to burn "at once" the cotton on Ford's plantation. (Page 12, printed record.)

"Vis Major."

Surget could not stop to discuss the matter as to the propriety of a military order. Obedience, not deliberation, is required of one put upon military duty. The party ordering was the one to determine when action was required. Surget was bound to obey and could not have resisted. There was no government *de jure* that could protect him. An overpowering necessity, a present irresistible force, a strong organized government with powerful armies, which taxed all the energies of the National Government for four years of desperate struggle to overcome it—these operated upon Surget to compel obedience. He could not have avoided obedience, and he cou'd not know how the war would result. As Vattel well says, it was not his province to sit in judgment upon the orders of his government, and it was *then* his government,

no matter how forcibly or unlawfully established, or how disastrously overthrown.

The law does not ask that impossible things be done. It is not blind to the motives and fears that influence men, it deals with them as responsible beings—responsible because they have liberty of thought and action. Destroy this liberty of thought and action, and responsibility ceases. It excuses the man who kills, if to save his own life, he must needs drown his fellow-man.

In Rockhold *vs.* Rockhold, 2 Otto, 129, the Chief Justice delivering the opinion, this Court refused to hold a trustee liable who under military order paid over trust funds to the Confederate receiver.

Let it be remembered that no question can properly arise in this discussion as to the character of Surget's act in view of the claims of the government *de jure* upon him. It is a question between individuals as to who shall bear the loss of a common attempt to rid themselves of obligations due to the National Government. Shall the courts protect the property of one rebel to the detriment of another and fasten upon that other the consequences of obedience to the potential government, which claimed and exercised by common consent of the governed, full power over life, limb, and property?

Instructions.

The refusal by the circuit court of Adams county to give certain instructions asked for by appellant, is assigned as error. Can this Court find in the record anything *tending* to show that this was erroneous? Counsel for appellant seem to think that the special pleas made some figure in the case, and that defendant introduced proof to sustain them. The record does not show this, or that any proof on either side was introduced except what might be guessed at from instructions given, for there is no bill of exceptions. It

was proper to refuse them if there was no evidence to which they were applicable. And this Court cannot know without the proof, whether the refusal to give was right or wrong. When a case is tried upon an issue of fact, and no evidence reported to the Court, the judgment will not be reversed because instructions containing abstract principles of law were given, if under any conceivable state of facts they would be proper.

Gwinn *vs.* Williams, 5 Cushman, 324.
Davis *vs.* Brown, Ibid., 265.

A jury has passed on some issues in the case, and we hold, as before stated, that this Court may well conclude (under the rule that all presumptions are in favor of the correctness of the judgment below, until error is shown by a full record) that plaintiff failed to prove title to or loss of the cotton, or that defendant burned it. If this position is correct, then we submit that though this Court should be of opinion that a Federal question was raised and has been properly assigned as error according to the rules of Court, (which we do not admit,) and that the demurrers below should have been sustained, and should so decide, yet the judgment below should be affirmed because there were issues upon two good pleas of the general issue not demurred to, upon which so far as the record shows the whole case may have turned before the jury, and upon which alone the Court of first instance may have based its judgment.

Murdock *vs.* City of Memphis, 20 Wall., 591, 634, 635, 636.

GEORGE TAYLOR,
W. T. MARTIN,
Of Counsel.